In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
Petitioner

v.

MIDCAL ALUMINUM, INC.,
Respondent

BAXTER RICE as Director of the
Department of Alcoholic Beverage Control
of the State of California,
Respondent

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

BRIEF FOR RESPONDENT MIDCAL ALUMINUM, INC.

ELLIOT S. KAPLAN
ROBINS, DAVIS & LYONS

FRANK C. DAMRELL, JR.
DAMRELL, DAMRELL & NELSON
Of Counsel

JACK B. OWENS
ROBERT E. FREITAS
ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE
600 Montgomery Street
San Francisco, California 94111
Telephone: (415) 392-1122
Attorneys for Respondent Midcal Aluminum, Inc.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7662

SUBJECT INDEX

SUBJECT INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Table of Authorities

Cases

Constitutions

Statutes

Regulations

Rules Page

Congressional Reports

Hearings

Congressional Record

Miscellaneous Reports

Texts

Law Reviews Page

Miscellaneous

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,
Petitioner

v.

MIDCAL ALUMINUM, INC.,
Respondent

BAXTER RICE as Director of the
Department of Alcoholic Beverage Control
of the State of California,
Respondent

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

BRIEF FOR RESPONDENT MIDCAL ALUMINUM, INC.

QUESTION PRESENTED

Under the Twenty-first Amendment or the state action doctrine, may a state compel private parties to fix prices for wine in direct violation of federal antitrust law, where the state exercises no control over those prices?

STATEMENT

In accord with a national pattern, California in the last five years repeatedly has turned away from "fair trade" concepts spawned in the Depression and has returned to a commitment to open price competition. Vestiges of resale price maintenance ("RPM") have lingered in the alcoholic beverage industry. However, in the last few years the responsible state governmental entities have rejected fair trade even in this industry. These entities have acted out of a developing understanding that alcoholic beverage fair trade does not serve the state's interests or the purposes attributed to it, conflicts with fundamental antitrust principles, and directly and significantly harms consumers.

This case, which comes to the Court from a state intermediate appellate court, concerns in particular wine RPM, as distinguished from other alcoholic beverages or from other commercial articles. However, the case comes on the heels of a series of decisions by state entities on alcoholic beverage fair trade in general—decisions that put this case in its full context. Although it has chosen not to defend RPM or even to appear in this Court, the state alcoholic beverage control agency is, for all practical purposes, the real party in interest. This agency administers the alcoholic beverage RPM provisions, and it is the decisions of this agency that petitioner would commit to the dictates of this Court. Yet, as will appear, this agency, the key agency under state law, no longer wants RPM. The exponents for a belated revival of RPM before this Court are a group of retailers who seek to be excused from the price competition otherwise commanded by the Sherman Act.

I

THE STATE STATUTES, GOVERNMENTAL ENTITIES, AND PARTIES INVOLVED

A. State Statutes

Alcoholic beverage RPM in California falls under statutes separate from the former general fair trade statutes. *Compare* Cal. Bus. & Prof. Code § 24755 (distilled spirits) and *id.*, § 24862 *et seq.* (wine), *with id.*, §§ 16900-05 (commodities) (repealed). The wine statutes, enacted in 1949, achieved their current form in 1968. 1949 Cal. Stats. ch. 574; 1968 Cal. Stats. ch. 205. Although the wine provisions appear in distinct statutory sections, the wine RPM system is similar in many respects to general fair trade systems formerly in effect in California and in other states, before the recent wave of repeals of such statutes.

The state statutes directly at issue, Cal. Bus. & Prof. Code §§ 24862 and 24866, appear at pp. 10-12 of the appendix to petitioner's opening brief.[1] The statutes deal with pricing activities at all three steps in the vertical distribution ladder—producers, wholesalers, and retailers. Under these statutes, as a condition of selling wine intended for off-premises consumption, producers (or, in certain cases, their designees) are compelled to fix the prices at which wholesalers sell to retailers and the minimum prices at which retailers may sell to consumers. This is accomplished through a combination of widely-publicized price schedules and "fair trade" contracts between entities in the chain of distribution.

The prices fixed under fair trade for wine in California are, with unimportant exceptions, rigid; they cannot be reduced in quick response to changing marketing condi-

---

[1]Corresponding regulations appear at 4 Cal. Admin. Code § 101, portions of which are set forth at pp. 7-9 of the appendix to petitioner's opening brief. See also pp. 451-56 of the record lodged with this Court (hereinafter cited as "R.").

tions. Moreover, in addition to making sales and resales illegal except at fixed prices, the RPM provisions explicitly make it illegal for retailers to buy wine except at fixed prices.

The state exercises no control over or review of the prices fixed pursuant to alcoholic beverage fair trade.[2] Subject to below-cost pricing prohibitions not pertinent here, the levels of those prices are determined solely by private parties. The only role of the state is to punish those who deviate from the fixed prices.

Wine is essentially a domestic industry in California; wine sales in the state "are basically of California produced wine."[3] Accordingly, the principal application of the statutes is to domestic wine, and the terms of the statutes indicate that their purposes do not include curbing imports.

Under the wine RPM provisions, the posting of any retail price above cost is permitted. Thus, the provisions do not prevent the setting of wine prices at very low prices by importers or domestic producers, and an importer is free to flood the California market with cheap wine.

B. State Governmental Entities

The state constitution lodges exclusive power to administer California's alcoholic beverage statutes, including those at issue in this case, in the state Department of Alcoholic Beverage Control ("ABC"). Cal. Const. art. XX, § 22.

---

[2]*See Rice v. ABC Appeals Bd.*, Pet. App. C at 10-11. Citations to the *Rice* case, also known as the *Corsetti* decision in reference to the alcoholic beverage licensees involved, are to the pages in Appendix C to the petition for certiorari, where the *Corsetti* opinion is reproduced. *Corsetti* is reported at 21 Cal. 3d 431 (1978).

[3]Joint Appendix (hereinafter cited as "Jt. App.") 40; R. 120.

The Director of the ABC, nominally a respondent herein, is appointed by "and shall serve at the pleasure of the Governor." *Ibid.*[4] The state constitution further provides:

> The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. *Ibid.*

The Director heads the ABC. *Ibid.* The California Constitution also makes the governor the supreme executive officer of the state. *Id.*, art. V, § 1. Accordingly, pursuant to state constitutional law, the governor is the highest officer with executive power over the state's alcoholic beverage laws, directly and through his deputy, the Director of the ABC, whom he can discharge at will and totally within his discretion.[5]

The state constitution also creates the ABC Appeals Board. *Id.*, art. XX, § 22. The Board reviews the actions of the ABC, including whether, *inter alia,* the ABC "has proceeded in the manner required by law. . . ." *Ibid.* Before June 6, 1978, the review power of the Board included passing on the validity of statutes within its purview. *E.g., Walker v. Munro,* 178 Cal. App. 2d 67 (1960). However, in June, 1978, the California electorate amended the state constitution by approving a ballot measure known as Proposition 5. Proposition 5, now Cal. Const. art. III, § 3.5, bars state agencies from declaring statutes unconstitutional and from refusing to enforce statutes on grounds of uncon-

---

[4]The Director's appointment is subject to confirmation by a majority vote of all members of the state Senate. *Ibid.*

[5]The State Attorney General ("AG") has *no* enforcement authority with regard to those statutes; the state constitution conveys enforcement powers exclusively to the ABC. *Id.*, art. XX, § 22. Furthermore, the AG's general law enforcement duties are expressly "subject to the powers and duties of the Governor. . . ." *Id.*, art. V, § 13.

stitutionality or conflict with federal law unless an appellate court previously has made such a determination.[6] The Board has held that Proposition 5 deprives it of authority to declare statutes invalid.[7]

In sum, the state legislature in California enacts state alcoholic beverage law, including fair trade. However, the state constitution also devolves considerable power over the field to the Director of the ABC, to the ABC Appeals Board, and to the governor. In addition, the state constitution gives the legislature direct authority to remove the Director at any time for "dereliction of duty." This means that the legislature has a ready check on the Director if it determines that the Director's policies are in frustration of its will.

C. Parties

At its origin, the parties to this case were the ABC and Midcal Aluminum, Inc. After the decision of the court below, the ABC ceased any defense of the RPM provisions. The remaining parties are Midcal, respondent herein, and the California Retail Liquor Dealers Association

---

[6]Art. III, § 3.5 reads as follows:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

[7]*In re Ferrigno,* AB-4637 (1979), Pet. App. E at 8; *In re Capiscean Corp.,* AB-4490 (1978). The Board ruling in *Capiscean* appears at R. 463-70. It also appears as Appendix D to the Memorandum in Opposition to Motion of State Attorney General, etc., filed earlier in this Court by respondent. The appendices to that Memorandum are cited hereinafter as "Memo. App."

(CRLDA), an intervenor below and petitioner in this Court.

Midcal is a licensed wholesaler (or "distributor") of wine and distilled spirits. It sells alcoholic beverages to licensed retailers for resale to consumers in Los Angeles and Orange Counties, California.[8]

CRLDA is a trade association, which claims membership of approximately 3,000 retailers. Jt. App. 39. There are approximately 24,000 off-sale retail licenses for wine in the state. R. 180. Approximately two-thirds of the CRLDA members are located in southern California, in the marketing area of Midcal. Jt. App. 39.

II

THE SERIES OF DECISIONS BY STATE GOVERNMENTAL ENTITIES LEADING UP TO THE DECISION BELOW

A. Background

California enacted fair trade for general articles of commerce in 1931, becoming the first state in the Union to attempt through authorized price fixing to reverse the collapse of prices brought about by the Great Depression. *See Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 390 (1951); 1931 Cal. Stats. ch. 278; Engman, *The Case for Repealing "Fair Trade,"* 7 Antitrust Law & Econ. Rev. 79, 80 (1975). As part of a national trend, the state repealed its general fair trade statute in 1975. 1975 Cal. Stats. ch. 402.[9] This was roughly simultaneous

---

[8]Jt. App. 4; R. 39.

[9]In 1977, California also repealed its statutes authorizing the Director of Food and Agriculture to establish minimum wholesale and retail milk prices. 1977 Cal. Stats. ch. 1192. The legislation repealing the former provisions included a statute permitting the Director to establish temporary minimum prices after public hearing and a finding that certain conditions exist. See Cal. Food & Ag. Code § 61582. The degree of state involvement in the setting of the levels of milk prices in California, either before or after the recent statutory change, does not exist for wine.

with Congress' repeal of the McGuire and Miller-Tydings Acts, the former federal fair trade exemptions from the price fixing prohibitions of § 1 of the Sherman Act and § 5 of the Federal Trade Commission Act. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

B. Recommendations for Ending Alcoholic Beverage RPM

The state Senate Select Committee on Laws Relating to Alcoholic Beverages indicted California alcoholic beverage fair trade in its final report in August, 1974 (hereinafter "Select Report"). The Select Committee noted that California "is rather unusual because it is one of the few states that has maintained a policy of Resale Price Maintenance in its regulation of the alcoholic beverage industry." Select Report 81. The Select Committee found the results of this "unusual" policy to be unacceptable. It led to artificially maintained consumer prices, "about the highest" in the nation, although California levies "one of the lowest excise taxes" in the country. *Id.*, 6, 9, 82. Alcoholic beverage RPM ". . . has resulted in the elimination of any semblance of competition within the industry." *Id.*, 9. The Select Committee found no connection between fair trade and temperance, allegedly one of fair trade's principal goals. The Committee concluded that alcoholic beverage RPM represented:

> . . . an industry policy of charging what the consuming public will pay. It does not appear to have anything to do with "promoting temperance."

Id., 82.

The conclusions of the Select Committee corroborate those of the New York State Moreland Commission on the Alcoholic Beverage Control Law, the well-respected commission whose work has been cited by the California Su-

preme Court and by this Court.[10] The Moreland Commission rejected compulsory RPM as "at war with the American system of free competition." Moreland Report 10. It found that RPM produced dramatically higher consumer prices than open price competition, *id.*, 3-8, yet "the assumed relationship between the system of mandatory resale price maintenance and the goal of temperance is non-existent." *Id.*, 14.[11] The Commission concluded that liquor RPM stifled competition and encouraged economic waste and inefficiency. *Id.*, 1. Its comprehensive review of the subject prompted the Commission to:

> . . . reject the proposition that state-enforced price decisions so important to the community at large

---

[10]*See* Report and Recommendations No. 3, Mandatory Resale Price Maintenance (1964), hereinafter cited as the Moreland Report. The Moreland Report was cited by the California Supreme Court in *Rice v. ABC Appeals Bd.*, Pet. App. C at 37. The Moreland Report was in the record before this Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39 n.8 (1966). The Court pointed out that the Report:

> . . . found unequivocally that compulsory resale price maintenance had had "no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol." It also found that New York liquor consumers had been the victims of serious discrimination because of the higher prices and reduced competition fostered by the mandatory minimum price maintenance provision of the law. The Commission therefore recommended the repeal of that provision. (footnotes omitted). *Id.*, 39.

[11]As a major reason for recommending the end of alcoholic beverage RPM, the Commission stated:

> Neither temperance nor respect for law is promoted by the artificially maintained high prices that sacrifice the interest of the consumer to the benefit of the liquor industry.

Id., 1. In a preliminary paper leading up to its Report, the Commission noted that the "main beneficiaries" of alcoholic beverage RPM appear to be retailers, the "main victims," consumers. Furthermore, if prices must remain high, "the State has ample power to keep them high without delegating price fixing power to private individuals and without committing itself to police their decisions." Moreland Commission Study Paper No. 5, Resale Price Maintenance in the Liquor Industry (1963).

should be turned over to a small private group with such a large direct financial self-interest.

Id., 2.

C. The Corsetti Decision

1. THE ABC APPEALS BOARD

As noted above, the state constitution creates the ABC Appeals Board as an administrative tribunal to review actions of the ABC. In 1976, the Appeals Board threw out RPM for distilled spirits in California, finding no rational relationship between the goals of the ABC Act (promotion of orderly marketing conditions and temperance)[12] and the RPM statutes. *In re Corsetti*, AB-4311, Memo. App. A at 16, 17, 19-23.

The Board concluded that the Sherman Act, as amended by the Consumer Goods Pricing Act of 1975, invalidated alcoholic beverage RPM, because RPM prompted *per se* illegal price fixing. *Id.*, 9-19. The Board ruled that the Twenty-first Amendment did not save RPM; that Amendment does not repeal the Commerce Clause (from which the Sherman Act derives), and the state played no role in the actual determination of prices. *Id.*, 11-19. Because there is no rational relationship between the ends of temperance and orderly marketing conditions and the means employed to achieve them (the RPM system), the Board also based its decision on state and federal equal protection grounds. *Id.*, 19-23.

2. THE CALIFORNIA SUPREME COURT

An intermediate appellate court rejected the Appeals Board decision in *Corsetti. Rice v. ABC Appeals Bd.*, 137 Cal. Rptr. 213 (1977), *vacated,* May 16, 1977. On May 30,

[12]*See Allied Properties v. ABC*, 53 Cal. 2d 141, 150 (1959) (". . . [T]he primary purpose of the fair trade provisions of the Alcoholic Beverage Control Act is to promote orderly marketing conditions and temperance.")

1978, the California Supreme Court reversed the lower court and reinstated the Appeals Board's invalidation of alcoholic beverage RPM. *Rice v. ABC Appeals Board*, Pet. App. C. Like the Board, the highest state court declared that: RPM led to price fixing and eliminated any semblance of competition; California consumers paid about the highest prices in the country; temperance was not promoted; and small retailers were not protected. *Id.*, 31, 33, 36, 37. The court concluded that the price fixing prompted by RPM collided with the Sherman Act and that there were alternative means to accomplish the state's ends without conflict with federal law. *Id.*, 38. Because the provisions of the federal constitution must be read as an integral whole, the Twenty-first Amendment is not dispositive; under the circumstances, state interests are outweighed by conflicting federal interests under the Commerce Clause. *Id.*, 21-39. And, because the state made no effort to regulate RPM prices but left them wholly to the discretion of private entities, RPM was not saved by the state action doctrine. *Id.*, 18.

D. Post-Corsetti Decisions by State Governmental Entities

Neither the state governor nor the state AG sought review of the California Supreme Court decision in the *Corsetti* matter. Significantly, the ABC, the state agency with exclusive jurisdiction over alcoholic beverage RPM, also elected not to seek review. The Director of the ABC explained this decision in recent hearings before state authorities in New Jersey:

> . . . [O]n May the 30th, [1978], when the decision [by the California Supreme Court in *Corsetti*] came down, there was tremendous pressure placed on me to take that case on into the Federal Courts. I saw no reason to do so, since I'm a state administrative agency, and my own State Supreme Court told me that the, that the [*sic*] law was violative of the Sherman Anti-trust

> Act, it was violative of certain state statutes, and, therefore, we waited for the 30 day period, we asked for reconsideration [by the California Supreme Court] during the 30 day period, and at the end of the 30 days when the [state] Court decided not to rehear or reconsider, we let the matter drop.[13]

In the course of his testimony, the Director also detailed the after-effects of the *Corsetti* decision in California. He pointed out that since *Corsetti* the ABC has "conducted extensive surveys within the industry in California at all levels . . . ," and "we have not one shred of evidence that one retailer has gone out of business as a result of the invalidation of fair trade." Memo. App. B at 3.[14] He pointed out

---

[13]Testimony of Baxter Rice, Director of the California ABC, before the New Jersey Department of Law & Public Safety, Division of Alcoholic Beverages Control, In re Informational Hearing on Price De-Regulation etc., Memo. App. B at 15 (February 9, 1979).

One of the entities that pressured Mr. Rice to seek certiorari in *Corsetti* was CRLDA, petitioner herein. Despite the request, Mr. Rice declined to seek further review. Jt. App. 44 ¶ 13.

After *Corsetti* became final in the state, the ABC repealed regulations governing retail RPM for distilled spirits. See 4 Cal. Admin. Code § 99 (repealed).

[14]Nor did the ABC find any indication that *Corsetti* had impeded the marketing of liquor licenses. *Id.*, 31. In his testimony, the Director also pointed out that the demise of RPM had not produced chaotic conditions in the alcoholic beverage industry in California:

> Let me initially say that prior to June of 1977, and during the last seven months, there were great prophets of doom and gloom for the demise of the independent retailer and for chaotic conditions in California. During the past seven months, we have conducted extensive surveys within the industry in California at all levels. We have discussed marketing practices and various marketing techniques of all the facets of the alcoholic beverage industries, and we've been unable to substantiate the prophecies of despair.
>
> On the contrary, the last two quarters in California have been red letter months. That is not to say that the invalidation of fair trade in California has not forced a re-evaluation of marketing practices and techniques, nor is it to say that there may not be a reduction of inefficient or non-innovative retailers,

that "the administration" in California opposed post-*Corsetti* bills in the state legislature to resurrect liquor fair trade. *Id.*, 6. The ABC Director also noted his personal opposition to fair trade, asking rhetorically "what purpose does the price posting serve other than the state acting as [the wholesalers'] industrial espionage agent." *Id.*, 18-19. He further referred to RPM as a "euphemism" for "profit guaranty." *Id.*, 5.

The Director's decision to abide by the state court decision in *Corsetti* was well publicized at the time, *e.g., State Gives In On Liquor Pricing,* L.A. Times, July 1, 1978, Part 1, 21, yet it did not lead to his removal from office by the governor, pursuant to that officer's absolutely discretionary removal power. Nor did the state legislature attempt to remove the Director on grounds of dereliction of duty. To the contrary, the post-*Corsetti* actions of the legislature and the governor are in accord with the policy course set by the Director—not to defend RPM, not to seek its reinstatement, and to enforce its vestiges only until invalidation occurs in the state courts. *See* Memo. App. B at 19: "I'm willing to take the case in court."

> but let me say this, that we have in California approximately 56,000 retailers, and we have not one shred of evidence that one retailer has gone out of business as a result of the invalidation of fair trade. Let me also emphasize that on an annual basis, we have approximately 18,000 licensed transactions, and that figure has not varied since the abolition of fair trade, either up or down, and that the reasons for people going in or out of business are the same today as they were a year ago. People are in this business at the manufacturing level, at the wholesale level, and at the retail level to make money. If they are not making money, then they should not be in the business. It's very simple. It's a very basic and fundamental principle of the free enterprise system.

Id., 3-4. ABC officials further pointed out in the New Jersey hearings that the invalidation of fair trade in California prompted immediate and sharp drops in retail prices, although industry cost increases have subsequently tempered this effect of free price competition. *Id.*, 21-22.

Shortly after the California Supreme Court decision in the *Corsetti* matter, the state legislature eliminated funding for RPM enforcement for distilled spirits. 1978 Cal. Stats. ch. 359, § 2, item 132, p. 29. After *Corsetti,* the legislature also rejected A.B. 935, an attempt, opposed by the ABC, to revive fair trade in the form of a minimum price markup for distilled spirits at the retail level. Memo. App. C; Memo. App. B at 6. On the other hand, the legislature passed a bill allowing retailers to pool their purchases of distilled spirits, in order to qualify for volume discounts. 1979 Cal. Stats. ch. 455. Cooperative buying of this kind was recommended by the Select Committee in 1974 as a step to be undertaken following the repeal of alcoholic beverage RPM. Select Report 84-85.

Given *Corsetti,* the decisions of the pertinent state entities not to seek reversal of that decision, the antipathy of the ABC and the ABC Appeals Board to alcoholic beverage RPM, the evident indifference of the legislature to revival of RPM, and the practical equivalence between the distilled spirits and wine RPM provisions in California, the wine RPM statutes came before the courts largely because of an intervening, unrelated event—Proposition 5. As noted above, Proposition 5 bars state administrative agencies from refusing to enforce state laws on grounds of federal or state unconstitutionality or conflict with federal statutes or regulations until those laws are invalidated by appellate courts. Proposition 5 was on the ballot before the California Supreme Court decision in the *Corsetti* matter. Its roots apparently lie in rulings by state public utilities agencies; it seems to have had nothing to do with *Corsetti. See, e.g., Southern Pac. Transp. Co. v. PUC,* 18 Cal. 3d 308 (1976). Coincidentally, Proposition 5 became law in the state within a matter of days after the California Supreme Court decision in *Corsetti.*

After *Corsetti* and Proposition 5, the ABC Appeals Board issued a ruling declaring its view that the wine RPM provisions were invalid but also declaring that Proposition 5 forbade it from invalidating them. *In re Capiscean Corp., supra,* n.7 (July 20, 1978). The ABC dropped its enforcement of distilled spirits RPM but took the position, as a formal matter and because of Proposition 5, that the analogous RPM statutes for wine were to be honored until the courts struck them down. Jt. App. 12-15. Thereafter, the *Capiscean* matter (which commenced before the California Supreme Court decision in *Corsetti*) proceeded to an intermediate appellate court, as noted below, and the ABC brought the instant prosecution, apparently as a test case to deal with the wholesale RPM provisions for wine. See Memo. App. B at 18.

In the state appellate court proceedings in *Capiscean* and the instant case, the ABC did not mount a vigorous defense of wine RPM, as will appear more fully below. Indeed, it is no overstatement to remark that the ABC did not really defend RPM at all; obviously the agency does not want it.[15] It has suggested the invalidity of wine RPM, at least at the

---

[15]The state AG appears to be the only high level state official actively striving to reinstate wine RPM. Before his election to office, the current AG was a member of the state legislature, where he supported alcoholic beverage RPM. *See, e.g.,* S.B. 1435 (1978) (co-sponsored by state senator Deukmejian) (Bill to grant Director of ABC power to enjoin RPM and other ABC Act violations), defeated in state legislature. As noted in text below, in post-*Corsetti* state proceedings against wine RPM, while representing the ABC, the AG has—on behalf of his then client—not presented an active defense for RPM. The AG has concurred in decisions not to seek review of state court decisions invalidating RPM. Now the AG attempts to defend wine RPM in *amicus* submissions to this Court. However, the ABC (which does not seek reversal here) has balked, and the AG has been compelled to inform this Court by letter of a "conflict of interest" with the ABC requiring the AG formally to withdraw any claim of representing the ABC before this Court. Letter to Honorable Michael Rodak, Jr. (November 29, 1979).

retail (consumer) level, to the state courts. R. 151, 166, 173. It (and the AG) have declined to seek review of state court decisions invalidating RPM. It has withdrawn from enforcement of retail RPM altogether in the last 18 months, although widespread retail price competition for wine is a matter of common knowledge in California. All of these ABC decisions in the last 18 months are of public record in the industry and in state government. Yet no effort has been made by the governor or the legislature, both of whom have ready removal powers, to deflect or alter the Proposition 5 based policy adopted by the ABC Director—not to defend wine RPM, and to cease enforcement if RPM is declared invalid by the state courts.

E. The Capiscean Decision

On January 2, 1979, the state Court of Appeal for the First Appellate District issued its ruling and opinion in *Capiscean Corp. v. ABC Appeals Bd. and ABC* (as real party in interest), 87 Cal. App. 3d 996, Pet. App. D. The *Capiscean* court "consider[ed] the validity of fair trade *laws* regulating the sale of wine in this state, in light of the ruling in" *Corsetti.* (emphasis added). Pet. App. D at 1. The court could discern no significant differences between the statutes invalidated in *Corsetti* and the wine RPM provisions, noting that "the impact of the restrictions is identical." *Id.,* 4. It referred specifically to and quoted Cal. Bus. & Prof. Code §§ 24862 and 24866, the precise wine RPM provisions at issue in the instant case. *Id.,* 3, 4. In light of the *Corsetti* (or *Rice*) decision, the court stated:

> We conclude that the wine price maintenance *provisions* cannot be distinguished from the price maintenance provisions invalidated in *Rice* and, for the reasons stated in *Rice,* must also fall. (emphasis added).

Id., 4.

The ABC did not seek review of the *Capiscean* ruling. Nor did the AG or anyone else. The ruling and judgment

of the court became final. Technically speaking, the judgment in *Capiscean* may reach only wine RPM at the retail (consumer) level; the accused in the case was a retailer prosecuted only for selling below fixed minimum retail prices. However, the court's opinion declares that wine RPM in California is invalid at both the wholesale and retail levels, and the court's ruling has been so interpreted. Comment, *Spirits and the Sherman Act,* 12 U.C.D. L. Rev. 176, 187 n.57 (1979).

III
THE PROCEEDINGS BELOW

This case commenced on August 15, 1978, with an ABC accusation against respondent Midcal for selling wine at other than posted prices. Jt. App. 16-18. The accusation issued before the *Capiscean* intermediate appellate court ruling. Midcal stipulated to the accusations of fact, and the case proceeded directly into state appellate court on a mandamus petition by Midcal seeking a determination of the invalidity of wholesale and retail wine RPM. Jt. App. 3-20.[16] CRLDA was permitted to intervene. R. 196.

The state AG appeared on behalf of the ABC, R. 61, referred to the ABC as "my client, respondent Department

---

[16]Although a wholesaler, Midcal was forced to challenge the validity of wine RPM at the retail as well as the wholesale level, for two reasons. First, retail and wholesale RPM are inextricably intertwined in the wine provisions. Second, Midcal was accused, in part, of selling to retailers a new product which had never been posted. Jt. App. 17. This new product was released shortly after the California Supreme Court decision in *Corsetti* and, indicative of the practical effects of that ruling in the state, no postings were ever made for it. As noted above, the wine RPM provisions forbid retailers from either buying or selling unposted products. One of Midcal's major customers refused to take the new product until the invalidity of the wine RPM provisions was established, and Midcal feared that other retailers would take the same position. R. 51-54. This impaired Midcal's ability to market its products and compelled it to challenge the retail as well as the wholesale RPM aspects of the wine provisions. *Ibid.*

of Alcoholic Beverage Control. . . ," R. 200, and notified the court that it was necessary for the AG "to consult with the respondent Director of the Department of Alcoholic Beverage Control and others so that policy considerations may be developed and determined . . . ." R. 57.

Thereafter the AG submitted a brief for the ABC repeatedly suggesting that at least the retail level price maintenance aspects of the wine provisions were invalid and advancing essentially none of the points the AG, in his proclaimed *"amicus"* role, is now pressing in this Court, after withdrawing as counsel for ABC. R. 147-177.

Only CRLDA actively espoused the maintenance of wine RPM in the proceedings below. As a major ground for its intervention motion, CRLDA cited the ABC's lack of interest in upholding or promoting fair trade. Jt. App. 27 ¶ VI, 37, 44 ¶ 13. In these sections of its complaint in intervention, supporting memorandum, and declaration, CRLDA informed the court below that the ABC was not interested in RPM enforcement, was a reluctant litigant, had not withdrawn totally from wine RPM enforcement solely because of Proposition 5, and had rejected CRLDA requests to seek certiorari in *Corsetti. Ibid.*

Consistent with *Capiscean* and *Corsetti,* the court below invalidated wine RPM. *Midcal Aluminum, Inc. v. Rice, Director of ABC*, 90 Cal. App. 3d 979 (1979), Pet. App. A. Neither the ABC nor the AG sought further review. Only CRLDA petitioned the highest state court, R. 380, which denied review. Pet. App. B. Neither the ABC nor the AG sought review in this Court. This Court granted CRLDA's petition for certiorari on October 1, 1979.

SUMMARY OF ARGUMENT

Viewed realistically, the arguments raised in support of reversal in this case represent a belated collateral attack on state court decisions, not before this Court, of a year and a year and a half ago. Moreover, the state officers with administrative authority over the statutes at issue do not seek reversal and do not endorse alcoholic beverage RPM. The Court has been benefitted by the views of the state AG (views in conflict with those espoused below and with previous decisions of the AG not to attempt to stem the demise of alcoholic beverage RPM), but that officer does not speak for the state on the subject matters raised. The real exponents of reversal are a group of retailers who would prefer not to have to engage in price competition.

The retailers pitch their case on federalism concepts, as reflected in the Twenty-first Amendment on the one hand and the state action doctrine on the other. They have chosen a particularly awkward vehicle for presenting these issues. The wine price fixing statutes at issue have no significant relationship to the practical problems of dry states which the Twenty-first Amendment was designed to solve, the state has no voice regarding the levels of prices that are fixed, and, as shown by the events of the last several years, the state has indicated anything but a vital interest in preserving the price fixing system at issue. Because of a series of decisions over the last three years by *state* governmental entities finding no significant state interests served by alcoholic beverage RPM, the state has largely adapted to the competitive principles of the Sherman Act —with no trace of the catastrophic consequences asserted by petitioner. It would be disruptive, if not impractical, to attempt to reverse that course at this late date and to reimpose RPM on state officers who do not want it. It would be most remarkable for this Court to do so by, as petitioner seeks, giving little or no consideration to the strong federal interests embodied in the Sherman Act.

Wine RPM in California constitutes price fixing in contravention of the antitrust laws. The governing rulings of this Court, coupled with the 1975 repeal of the federal exemption for fair trade, make this evident. Petitioner attempts to rely on passages from congressional reports on the 1975 federal repeal of fair trade, but it is clear that Congress carved out no exemption for alcoholic beverages when it revoked the McGuire and Miller-Tydings Acts. The only open question is whether some other exception to the otherwise controlling policies and prohibitions of the antitrust laws permits reversal of the judgment below.

In support of the price fixing regime it seeks to reinstate, petitioner asserts three grounds: (i) two narrowly drawn federal statutes that preceded the Twenty-first Amendment; (ii) the second section of the Twenty-first Amendment, a provision aimed at the peculiarities of ancient Commerce Clause doctrine that, in the 1930's, were thought to impede the ability of those states wishing to remain "dry" in that era to remain dry; and (iii) the state action doctrine, which is plainly designed to cover programs in which the state *itself* actively controls the establishment of prices (and in so doing creates a surrogate guardian for the public interest, in lieu of the beneficent effects of the open price competition otherwise commanded by the antitrust laws). No such state supervision of prices is present here.

Petitioner's reliance on the above three theories is wholly misplaced.

The narrowly focused, federal statutory evolution antedating § 2 of the Twenty-first Amendment merits this Court's attention solely because that history helps to demonstrate that the original and principal mission of § 2 was to assist the states that were "dry" in the 1930's to remain dry, despite the repeal of federal prohibition effected by

§ 1 of the Amendment. The federal statutes cited by petitioner in its opening brief were early efforts, often unsuccessful, to assist dry states in cutting off importation of liquor from "wet" states by mail order and other techniques that, as a practical matter, often escaped local enforcement. The federal statutes were of dubious constitutionality and subject to the shifting contours of Commerce Clause doctrine in that era. Section 2 of the Twenty-first Amendment "constitutionalized" those statutes, to provide firmer protection for the dry states. Apart from that, the statutes have no pertinence to this proceeding. If addressed by this Court on the merits, they do not provide a ground for reversal of the judgment below. Moreover, they cannot properly be treated by this Court as a distinct ground for reversal, for they were not pressed or passed upon below nor included within the questions presented to this Court in the petition for certiorari.

Petitioner espouses the "absolutist" view of § 2 of the Twenty-first Amendment, arguing that the provision totally negates the Commerce Clause. There have been occasional separate opinions by individual Justices adopting absolutist views of the Amendment. However, those views have never commanded a Court and have been rejected in a number of majority opinions. Petitioner's absolutist reading of the Twenty-first Amendment is patently wrong. Under the correct reading, respondent submits, this Court's judgment must be affirmance.

The Twenty-first Amendment did not *pro tanto* repeal the Commerce Clause or the federal antitrust laws enacted thereunder. An accommodation must be reached between the competing constitutional provisions. The accommodation must give appropriate recognition to the relative significance of opposing federal and state interests, as determined by the specifics of particular cases. The only correct accommodation of the constitutional provisions and

respective interests in this case is to recognize the prevalence of federal law. On the federal side, there is a frontal attack on core principles of federal antitrust law, an important body of national law, with no effort by the state to create a surrogate system for protecting federal goals. On the state side, there is an absence of state supervision over the activities at issue, extensive availability of alternatives to the state to promote its purported purposes without running afoul of the antitrust laws, an unwillingness on the part of the authorized state officials to rise to the defense of the price fixing activities, little or no relationship between the state's ends and RPM, and an area of conduct quite remote from the concerns that prompted the Twenty-first Amendment.

The text, background and history of § 2 of the Twenty-first Amendment clearly demonstrate that the provision's central purpose was to permit historically dry states to remain dry, if they chose to do so, despite the repeal of national prohibition. These indicia reveal no intention to revoke the federal antitrust laws for the benefit of the alcoholic beverage industry, and any such result would be wholly incorrect.

The text of § 2 reaches only *"transportation or importation"* of intoxicating liquors *"into* any State . . . for delivery or use therein . . . in violation of the laws thereof . . ." (emphasis added). This is not an *"importation . . . into"* case, and California is not a dry state. The wine industry in California is by great predominance domestic, and the state statutes at issue do not seek prohibition and are not aimed at importation or at "transportation" into the state.

The Wilson and Webb-Kenyon Acts, coupled with Repeal, form the background of the Twenty-first Amendment. The experiences encountered before and after enactment of

those federal statutes illuminate the essentially narrrow purpose of § 2, which is fully reflected in its text. The congressional debates on § 2, as well as contemporaneous congressional enactments, confirm again that § 2 does not warrant, much less command, a reversal in this case.

The states indisputably possess extensive power to regulate the alcoholic beverage industry, and the Twenty-first Amendment does temper the full force of the Commerce Clause in this field. Four brief rulings by this Court in liquor importation cases in the late 1930's departed from the text and history of the Amendment and suggested massive inroads on the Commerce Clause even in non-importation matters. However, this Court's subsequent decisions recognize that the Twenty-first Amendment does not undo the remainder of the Constitution, including the Commerce Clause and the exercise of federal regulatory power pursuant thereto over matters of substantial federal concern. Except in cases dealing exclusively and specifically with state efforts to control importation, the early importation cases are not the law.

The Court previously has recognized the full application of the Sherman Act to alcoholic beverages, even where states have comprehensive regulatory systems. It has never held that the federal antitrust laws automatically succumb to the authority of the states over alcoholic beverages, although it has been urged to do so in previous cases. It most certainly has never upheld the kind of unsupervised price fixing espoused by petitioner. In the past, it has bypassed resolution of the square conflict petitioner urges upon it here, by finding no conflict between sovereignties on the facts presented and reserving judgment until such a case clearly arises. If this is the appropriate case for resolving such a conflict, the correct result is to recognize the predominance of the stringent federal ban against price fixing, especially of the kind at issue here.

The state action doctrine, as enunciated in the decisions of this Court, does not save the RPM system in issue. There can be no dispute that Congress intended the Sherman Act to outlaw RPM systems of this nature and thus the state action doctrine does not apply. In any event, the doctrine envisions actual state supervision of the activities for which antitrust exemption is claimed. The fair trade activity in dispute is devoid of state review or control. The state itself does not set the prices that result, does not approve them in advance, and does not engage in any reexamination of them after they have been fixed by private parties. Moreover, vertical price fixing is not necessary to the state's scheme of alcoholic beverage regulation. Numerous alternative means are readily available to the state to promote its ends without conflict with antitrust requirements, and, on balance, the damage to federal interests caused by the RPM system far outweighs any protected state interest.

ARGUMENT

INTRODUCTORY

This case amounts to an attempted collateral attack on the *Corsetti* decision of the California Supreme Court some 18 months after the judgment in that case became final. As the AG states in his *amicus* brief:

> Of course, *Rice v. Alcoholic Beverage Control Appeals Board* is long since final. The decision of this Court herein will not directly affect the parties to that case.

AG *Amicus* Br. 36. It equally represents a belated collateral attack on *Capiscean*.

The key party in *Corsetti* was, of course, the ABC. The ABC is bound by that judgment and by the judgment in *Capiscean*. The ABC does not seek reversal in this case. The ABC, the governor, and the AG all decided not to seek this Court's review in *Corsetti*. The Director of the

ABC is on record opposing alcoholic beverage RPM. The ABC Appeals Board has rejected it. The ABC has not actively enforced wine RPM at the retail level since the highest state court decision in *Corsetti*. In addition: (i) the Director of the ABC, on behalf of "the administration," testified in opposition to proposed legislation to reinstate a form of RPM for distilled spirits; (ii) the state legislature rejected the bill opposed by the ABC as well as a bill to give the ABC injunctive powers to enforce RPM; (iii) the legislature eliminated funding for enforcement of distilled spirits RPM; (iv) the ABC withdrew its regulations in that area; (v) the legislature enacted cooperative buying legislation on behalf of retailers, proposed previously by the Senate Select Committee as an ameliorative step to be taken after repeal of fair trade; (vi) the AG and the ABC both elected not to seek further review of the state court decision in *Capiscean* declaring invalid the wholesale and retail wine statutes also at issue in this case; (vii) neither the AG nor the ABC sought highest state court review or this Court's review of the judgment below in this case; and (viii) neither the governor nor the legislature has made any attempt to remove the Director of the ABC from office.

It is evident that the state executive officers empowered by the state constitution to administer the statutes at issue do not desire to see wine RPM continued. The legislature apparently does not see it as a vital issue. The AG, who declined to mount an active defense below and who allowed *Capiscean* to become a final judgment against the ABC, has filed an *amicus* brief in support of CRLDA in this Court, but under state law the AG does not speak for the state on the particular statutes at issue. *See* n.5, *supra*. The absence of a strong state commitment to RPM constitutes the background against which the two federalism issues raised in this case—the Twenty-first Amendment and the state action doctrine—must be viewed.

The active exponents of fair trade in this case are a subset of the state's distilled spirits and wine retailers, Jt. App. 39-40, 43, seeking to reinstate by indirect means what the Sherman Act bans them from accomplishing directly—a cessation of price competition at the retail level. In the first months after *Corsetti*, they directed their efforts to persuading the ABC to seek certiorari. The ABC declined. Jt. App. 44. During that period, the *Capiscean* matter was in litigation in the state courts; CRLDA made no effort to intervene. Now, belatedly, it seeks to erase the events of the last few years through this case.

At this point, *Corsetti* cannot be undone. Distilled spirits RPM is history in California. Reinstatement of wine RPM, if possible, would not produce the "comprehensive regulatory scheme" referred to in petitioner's brief. Pet. Br. 3. Rather, it would produce a regulatory patchwork, with selective and unfair application reaching only a part of the alcoholic beverage industry. It would unwind the process of adjustment the state has made to the pro-competitive policies of the antitrust laws. Moreover, it would be antithetical to the interests of consumers who, in a period of double-digit inflation, would experience a return to the previous high price levels prompted by RPM.

There is, in any event, a serious question under state law regarding the collateral estoppel effects of the *Capiscean* decision, a judgment which is not before this Court. The ABC litigated the validity of the wine RPM statutes in *Capiscean* and suffered a judgment, which is now final. The ABC confronted a different litigant in this case and the issue is one of law, not fact, but California abandoned the mutuality rule years ago, *Bernhard v. Bank of America,* 19 Cal. 2d 807 (1942), and a number of state court decisions recognize the applicability of collateral estoppel principles

to rulings of law. *E.g., City of Los Angeles v. City of San Fernando,* 14 Cal. 3d 199 (1975); *Hollywood Circle, Inc. v. ABC,* 55 Cal. 2d 728 (1961). The outcome of the issue is not wholly clear; complicated questions of state law abound, the implications of which have not been fully resolved. *E.g., Chern v. Bank of America,* 15 Cal. 3d 866 (1976) (questioning application of collateral estoppel and abrogation of mutuality rule as to questions of law and acknowledging public interest exception in particular circumstances). *But see Slater v. Blackwood,* 15 Cal. 3d 791, 796 (1975) (criticizing general injustice exception to application of res judicata).

These questions raise a risk that the Court may engage in an academic exercise in addressing the validity of the wine RPM statutes. Moreover, the state law collateral estoppel questions raised are not for this Court to resolve. They should be addressed in state court proceedings.

Respondent does not deny the importance of achieving an appropriate accommodation of the significant local concerns that prompted § 2 of the Twenty-first Amendment and the weighty federal interests embodied in the Commerce Clause, Supremacy Clause, and Sherman Act. In light of the background of the instant matter, respondent does question whether this is the appropriate vehicle for seeking the accommodation. CRLDA, not the involved state officials, is carrying this fight. However, in the event that the Court is of the view that it should proceed to the merits, the correct result under the law is affirmance of the judgment below.

I

THE WINE RPM PROVISIONS IN DISPUTE CONTRAVENE THE ANTITRUST LAWS

A. The Wine RPM Provisions Compel Price Fixing Forbidden By Federal Law

Petitioner seeks to prevent price competition among wine retailers. Agreement by petitioner's members to accomplish this would constitute *per se* illegal horizontal price fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Similarly, agreements to fix the price at which the purchaser of a commodity may resell ("vertical" price fixing) were ruled illegal by this Court as early as 1911. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373.

The wine RPM provisions produce price fixing due to state compulsion, rather than the voluntary, private "contract, combination or conspiracy" covered by the terms of § 1 of the Sherman Act. Accordingly, those who have complied with the wine RPM statutes are not subject to antitrust liability. However, this does not save the statutes. Thirty years ago, this Court confronted arguments that an analogous fair trade system survived the Sherman Act because state law, not private agreement, was the source of the price fixing activities. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). *See, e.g.*, Brief for Respondents 8; *Amicus* Brief for National Ass'n of Retail Druggists, et al. 8-10. The Court rejected this point and invalidated the state statute at issue, ruling that the state may not simply command private conduct which the Sherman Act otherwise forbids. 341 U.S. at 389. Thus, the wine RPM statutes strike at the core of fundamental federal antitrust laws and are invalid unless saved by the Twenty-first Amendment or the state action doctrine.

B. Congress Did Not Exclude Alcoholic Beverages From The 1975 Repeal Of The Federal Fair Trade Exemption From The Antitrust Laws

As the California Supreme Court pointed out in its *Corsetti* decision, the repeal of the federal fair trade exemption in 1975 brought the state's alcoholic beverage RPM systems squarely into conflict with the Sherman Act. *Rice v. ABC Appeals Bd.*, Pet. App. C at 8-19. Petitioner and the AG contend that Congress excepted alcoholic beverages from the effect of the repeal of the federal fair trade exemption (which restored the full ban of the Sherman Act and the FTC Act against price fixing). They point to passages in House and Senate Reports accompanying the federal repealer in 1975. Pet. Br. 22; AG Br. 23-25. Their contention is meritless. The text of the Consumer Goods Pricing Act of 1975 plainly and literally applies to all articles, alcoholic beverages or otherwise.[17] Moreover, the report passages referred to stand not for what petitioner and the AG assert but for precisely the opposite point. They demonstrate a congressional awareness that the 1975 repealer covered alcoholic beverages; they show no intent to exempt alcoholic beverages from the repeal of the McGuire

---

[17] The Consumer Goods Pricing Act of 1975 reads as follows:

An Act to amend the Sherman Antitrust Act to provide lower prices for consumers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Goods Pricing Act of 1975".

SEC. 2. Section 1 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1), is amended by striking out the colon preceding the first proviso in the first sentence and all that follows down through the end of such sentence and inserting in lieu thereof a period.

SEC. 3. Paragraphs (2) through (5) of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) are repealed and paragraph (6) of such section 5(a) is redesignated as paragraph (2).

SEC. 4. The amendments made by sections 2 and 3 of this Act shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act.

and Miller-Tydings Acts. To be sure, the passages acknowledge that the Twenty-first Amendment may create a special situation for alcoholic beverage fair trade, despite the 1975 repealer. However, the reports are otherwise of no significance to this case. The House Report simply flags the issue, offering no opinion on the outcome of the constitutional question presented, and simply deferring to the independent body of law under the Twenty-first Amendment, whatever it provides. The Senate Report offers an opinion on resolution of the constitutional issue, but as shown below, the opinion expressed in the report was not addressed to the kind of wine RPM engaged in by California.

The passage from the House Report cited by the AG is the Report's only reference to alcoholic beverages. With a more accurate emphasis, the passage reads:

> Some concern was expressed in the hearings before the subcommittee that the repeal of Miller-Tydings and McGuire might impinge in some fashion upon the power of States to regulate liquor traffic under the second section of the 21st amendment. No such effect is intended. *The repeal* would terminate the power of liquor manufacturers to set resale prices under a general "fair trade" statute, but *would leave unimpaired whatever power the States have under the 21st amendment to regulate the importation of liquor from outside the State.* (emphasis added).

H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 n.2 (1975).

Thus, the Report clearly shows that alcoholic beverages are subject to the general fair trade repealer, and that the Committee wished to stress the obvious—that the repealer was not intended to and could not alter the effects, whatever they are, of an independent provision of the Constitution. The Committee declined to opine on the outcome of the Twenty-first Amendment inquiry. However, the Committee did reveal that, as does respondent, it reads the Twenty-first Amendment as giving states power only *"to regulate the importation of liquor."*[18]

The passage from the Senate Report asserted by the AG and petitioner states:

> Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment.

S. Rep. No. 94-466, 94th Cong., 1st Sess. 2 (1975).

As in the case of the House Report, the Senate Report, confirming the text of the 1975 repealer, demonstrates that alcoholic beverages are within the scope of the repeal of fair trade. Unlike the House Report, the Senate Report offers an opinion that some state "price fixing" statutes for alcoholic beverages may survive the 1975 federal repealer because of the Twenty-first Amendment. In other words, although one shield for price control statutes (the McGuire and Miller-Tydings exemption) is gone, another may remain—the Twenty-first Amendment.

A statement of opinion by Congress, much less one Committee of Congress, cannot bind this Court on the constitutional question at issue. Thus, the opinion expressed in the Senate Report is entitled to little weight here. Moreover, if any weight were to be given it, the opinion still cannot assist petitioner and the AG, when it is considered in the context in which it was offered. Hearings before the

---

[18] A further significant aspect of the Committee's language is the distinction made between private power to "set" prices and state power to regulate the importation of alcoholic beverages. Clearly, the Committee expressed no intention to allow private persons to establish resale prices.

pertinent Senate subcommittee demonstrate that the opinion is not addressed to RPM statutes such as those at issue, in which private parties rather than the state set the level of prices. Rather, the reference to "price fixing statutes" passed by states pursuant to the Twenty-first Amendment, and thus the gratuitous opinion about that Amendment, is directed to statutes under which the state itself establishes prices, which is not the case here. The transcript of the Senate subcommittee hearings on S. 408, a predecessor to the 1975 repealer, demonstrates that the subcommittee's focus was on state statutes under which alcoholic beverages are "either sold by state liquor stores or the prices are set by state law."[19] The validity of state statutes under which a state monopolizes the sale of alcoholic beverages or exercises actual control over prices is not before the Court in this case, and situations of that kind raise considerations not presented here. Yet the Senate Report passage cited by petitioner and the AG, properly understood, refers only to such situations.

---

[19] *A Bill To Repeal The Fair Trade Laws: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 66 (1975) (statement of Subcommittee counsel). *See id.*, 68:

> The 21st Amendment to the Constitution, which repeals prohibition, gave the states broad power over the sale of alcohol and gave them the power to *set prices* on it. Thus, it is possible, even if the fair trade laws are repealed, for individual states to pass *laws which would control the price of alcohol.* (emphasis added).

II

THE WILSON AND WEBB-KENYON ACTS PROVIDE NO GROUND FOR REVERSAL IN THIS CASE, ON THE MERITS AND BECAUSE THEY WERE NOT PROPERLY PRESENTED BY PETITIONER. AS DIRECT PREDECESSORS OF § 2 OF THE TWENTY-FIRST AMENDMENT, THEIR REAL SIGNIFICANCE IS TO ILLUMINATE THE LIMITED PURPOSE OF § 2

A. Petitioner cannot espouse the Wilson and Webb-Kenyon Acts as grounds for reversal in this Court

Petitioner's brief in the court below contains a cursory, one-line reference to the Webb-Kenyon Act, 27 U.S.C. § 122, and no mention of the Wilson Act, 27 U.S.C. § 121. R. 232. Not surprisingly, the court did not pass on those statutes. CRLDA's petition for review to the highest state court, which was denied, contains no mention whatsoever of Wilson or Webb-Kenyon. R. 380 *et seq.* Nor did petitioner include them within the questions presented in its petition to this Court. Since the statutes were not briefed, pressed or passed upon in the courts below and not included within the questions presented to this Court, petitioner cannot rely on them as a ground for reversal now. *E.g., Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *California v. Taylor,* 353 U.S. 553, 557 n.2 (1957); Supreme Court Rule 23.1(c).

B. On the merits, the Wilson and Webb-Kenyon Acts provide no support to petitioner. Their sole significance is to illuminate the narrow historical background of § 2 of the Twenty-first Amendment

Although petitioner has not preserved them as independent grounds for reversal, it does not follow that no heed should be paid to the Wilson and Webb-Kenyon Acts. The Acts comprise a significant part of the federal statutory evolution leading up to the Twenty-first Amendment. They help demonstrate that the purpose of § 2 was to help dry states keep dry despite the repeal of Prohibition, but not to create an absolutist regime of plenary state power over all aspects of the alcoholic beverage industry.

Petitioner's analysis of the history of Wilson and Webb-Kenyon consists of a selective and inaccurate summary of the relevant cases and reflects a fundamental misunderstanding of why the statutes came about and what they were aimed at accomplishing. This occurs because of a failure to take into account the practical effects of Commerce Clause doctrine as it was defined by this Court at the time those statutes were enacted. Wilson and Webb-Kenyon simply permit the states to regulate what they previously could not deal with at all—importation of alcoholic beverages.

Wilson and Webb-Kenyon do not control in the case of a clash *between* federal and state regulation. In such instances, the statutes are irrelevant. They do not remove the power of Congress affirmatively to regulate (as in the antitrust laws), which, of course, Congress can do whenever the activity regulated affects interstate commerce.

The history of the treatment of alcoholic beverages before the enactment of the Twenty-first Amendment does not illustrate, despite petitioner's suggestion, general repeal of the Commerce Clause in this field. Pet. Br. 29-37. Rather, it demonstrates a narrow congressional purpose to permit those states wishing to prohibit trafficking in liquor within their borders, i.e., "dry states," to do so without being frustrated by shipments of liquor from outside their boundaries under "stream of commerce" concepts adopted by this Court. Under those concepts, a state's authority to regulate commerce in domestic liquors did not extend to a power to limit articles *in* interstate commerce, even if Congress took no action. Alcoholic beverages in interstate commerce were treated like any other commodity, *Leisy v. Hardin,* 135 U.S. 100, 110 (1890), and thus the power to regulate them resided exclusively in Congress. *E.g., Bowman v. Chicago & Northwestern Ry. Co.,* 125 U.S. 465 (1888). The states had *no power* to regulate alcoholic bev-

erages *in interstate commerce. Leisy v. Hardin, supra,* 135 U.S. at 125.

In *Brown v. Maryland,* 12 Wheat. 419 (1827), the Court held that state power to tax imports began at the point at which the imported goods were commingled with the mass of other goods in the state. In *Leisy,* following *Brown,* the Court adopted the commingling concept, held alcoholic beverages exempt from regulation until commingling occurred, and determined that commingling did not occur until the original package in which the goods were shipped was broken or sold.

Leisy was decided on April 28, 1890. Immediately, Senator Wilson of Iowa introduced a bill to overrule the effects of *Leisy* which was reported to the floor of the Senate from the Judiciary Committee on May 14, 1890. 21 Cong. Rec. 4642 (1890). The bill had thus been introduced, passed through committee and reported to the Senate within the 17 days following the Court's decision in *Leisy*.

Debate on the bill began just six days later on May 20th. *Id.,* 4954. A review of the debate reveals that the Wilson Act was enacted for the narrow purpose of overruling *Leisy* and permitting prohibition states to arrest the sale of liquor in its original package. Accordingly, the Wilson Act is popularly known as "The Original Packages Act." 27 U.S.C. § 121.

Senator Wilson began the debate on the bill which was to become the Wilson Act by offering to explain its nature, character and extent. 21 Cong. Rec. 4954 (1890). He quoted the Court's language in *Leisy* which explained that the states had no power to regulate interstate commerce absent congressional action and suggested that Congress take action to permit the states to regulate. *Ibid.* Senator Wilson then stated: "The bill in its amended form is a response to the suggestion contained in this declaration of

the Court." *Ibid.* He went on to explain: "If a state shall desire prohibition, it can adopt it and exercise it and enforce it under the provisions of this bill." *Ibid.* Thus, Senator Wilson expressed a desire to protect the dry states by legislatively overruling *Leisy* and permitting states to act even though alcoholic beverages remained in their original packages.

The language of the Wilson Act shows that Congress did not intend to divest itself of any power to regulate alcoholic beverages, but desired solely to effectuate Senator Wilson's narrow goal of permitting dry states to remain dry. In response to the *Leisy* holding, Congress simply redefined the circumstances in which alcoholic beverages would be *in commerce* and thus totally beyond the powers of the states under then-prevailing Commerce Clause doctrine. The Act provides as follows:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.* (emphasis added).

The Wilson Act thus served the narrow purpose of overruling *Leisy.* It made imported liquor subject to state regulation by denying alcoholic beverages in the original package the protection otherwise accorded to goods in commerce. It did so by providing that such beverages would no longer be *in* commerce, upon arrival in a state. Congress thus gave the states *some* additional power to regulate alcoholic beverages. The Act did not, however, remove any

pre-existing federal regulatory power or alter the effect of the Supremacy Clause, which ordinarily dictates that state law is invalid if it conflicts with federal law.

The Wilson Act was rendered virtually useless to accomplish even its limited purpose by this Court's decision in *Rhodes v. Iowa,* 170 U.S. 412 (1898). *Rhodes* concerned the point at which state law could reach alcoholic beverages which had been shipped interstate. The Court held the beverages immune from state control until received by the consignee. The Wilson Act made state law applicable upon the "arrival" of liquor within the state. In *Rhodes,* the Court defined "arrival" as delivery to the consignee, rather than any preceding point in shipment. *Id.,* 423. Under this ruling, the states were powerless to forbid their citizens from receiving liquor which had been acquired by a sale in interstate commerce.

In the years following *Rhodes* the mail order liquor business thrived, as the Court's decision had made prohibition states powerless to ban receipt of liquor obtained by mail order purchases in interstate commerce. Despite numerous challenges to the Court's reading of the Wilson Act, there was no departure from the *Rhodes* analysis. *See, e.g., American Express Co. v. Iowa,* 196 U.S. 133 (1905); *Heyman v. Southern Ry. Co.,* 203 U.S. 270 (1906); *Adams Express Co. v. Kentucky,* 206 U.S. 129 (1907). The continuing practice of mail order shipment of alcoholic beverages to consignees in prohibition states ultimately led to the enactment of Webb-Kenyon.

The Webb-Kenyon Act was sponsored by Representative Webb of North Carolina and Senator Kenyon of Iowa, both representing prohibition states. The legislative history of the Act is typified by the remarks of Senator Sanders of Tennessee, another prohibition state, who opened the Senate debate as follows:

> This bill relates to nothing but the shipment of intoxicating liquors from one State into another State where it is to be sold in violation of State laws concerning same.

49 Cong. Rec. 699 (1912). Speaking of Tennessee's own prohibition law, Senator Sanders stated that:

> These laws are enforced in most of the counties fairly well, but are violated in the many counties, especially those having large cities, on account of the corrupting influence of the large number of mail-order liquor houses. . . . *Id.,* 700.

Senator Sanders then launched into a tirade on the evils of the mail order business. *Ibid.*

The language chosen by the drafters of the Act is addressed to the narrow purpose of closing the gaps left open by the Wilson Act and thus assisting dry states to remain dry. Webb-Kenyon provides, in pertinent part:

> The shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited.

Webb-Kenyon is an anti-mail order statute. It forbids *importation* of alcoholic beverages intended to be received, possessed or used in violation of state law, regardless of the situs of the sale. Like the Wilson Act, Webb-Kenyon does not deprive Congress of any of its regulatory powers over alcoholic beverages or generally exempt transactions in such beverages from the dictates of the Commerce Clause and the Supremacy Clause. Petitioner's assertion

that "liquor was removed from the Commerce Clause" by Webb-Kenyon, Pet. Br. 31, is nonsense.[20]

Petitioner devotes the majority of its Webb-Kenyon discussion to a series of quotations from *Clark Distilling Co. v. Western Maryland Ry. Co.,* 242 U.S. 311 (1917). The only quotation that counts is as follows:

> . . . [T]here is no room for doubt that [the Webb-Kenyon Act] was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to *prevent the immunity characteristic of interstate commerce* from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. (emphasis added).

---

[20] Petitioner suggests that the 1935 "reenactment" of Webb-Kenyon somehow supports its position. Pet. Br. 36. This suggestion is equally devoid of merit.

Webb-Kenyon was reenacted as part of clean-up legislation in 1935 which restored order to federal regulation of liquor after the repeal of prohibition. The specific purpose for the reenactment of Webb-Kenyon as part of this legislation was to insure that the contemporaneous repeal of the Cullen Beer Act (which blocked the importation of 3.2 beer into dry states in language analogous to Webb-Kenyon) would not be misinterpreted to permit unwanted importation of 3.2 beer. S. Rep. No. 1330, 74th Cong., 1st Sess. 5 (1935).

Moreover, the brief discussion of Webb-Kenyon during the debates on the 1935 legislation confirms respondent's view of the correct interpretation of the Act. Senator Ashurst presented the reenactment bill to the Senate. His only comments on Webb-Kenyon are as follows:

> This is a bill codifying the present liquor laws. It repeals certain laws which are obsolete—for example, war prohibition. It also repeals what we call the Cullen Beer Act, providing for the sale of beer containing 3.2 per cent alcohol by weight. *It preserves what is denominated as the Webb-Kenyon law, which protects the dry states.* I need not explain what that means. Senators know what the Webb-Kenyon law is . . . . (emphasis added).

79 Cong. Rec. 13409 (1935).

Id., 324. This explication of the Act is fatal to petitioner's attempted reliance on Webb-Kenyon. In this passage, the Court made it clear that Webb-Kenyon is only an extension of the Wilson Act, with the simple purpose of preventing the receipt of liquor through interstate commerce in violation of state laws. *Clark* simply holds that Congress can permit the states to regulate alcoholic beverages although those beverages are in commerce. It says nothing about the resolution of conflicting federal and state law nor does it in any way temper Congress' power, when it chooses to exercise it, under the Commerce Clause.

Petitioner makes a similar error in citing *National Railroad Passenger Corp. v. Miller,* 358 F. Supp. 1321 (D. Kan.) (three judge court), *aff'd,* 414 U.S. 948 (1973). In *Miller,* the court observed that Webb-Kenyon "took away the protection of interstate commerce from all receipt and possession of liquor prohibited by State law." 358 F. Supp. at 1326. This comment means no more than that receipt and possession of alcoholic beverages in violation of state law cannot be defended simply by establishing that the beverages were "in commerce." As the district court noted in *Miller,* Kansas, the state at issue, which sought to block the sale of liquor by the drink on Amtrak trains, had a long history of prohibition: "Perhaps no state has had more rigid laws." *Id.*, 1327. The state had a particular antipathy to saloons, even if they happened to be on railroad trains. *Id.*, 1328. All that *Miller* holds is that the Webb-Kenyon Act permitted Kansas to block importation of alcoholic beverages via a movable saloon—a dining car—where local law forbade sales by the drink. It is impossible to extrapolate from that holding to the reading of Wilson and Webb-Kenyon engaged in by petitioner.

Wilson and Webb-Kenyon are narrow statutes designed to help prohibition states remain dry. The statutes simply

redefine the "in commerce" concepts of *Brown v. Maryland* and *Leisy v. Hardin,* to permit the states to act when Congress does not. Nothing in the text or history of either of these statutes shows that Congress intended to eliminate any of its powers over interstate commerce or to otherwise exempt alcoholic beverages from important bodies of national law. The statutes are helpful here only because their text and history demonstrate the limited scope and purpose of § 2 of the Twenty-first Amendment, into which they were embodied.

III

IN THIS INSTANCE THE CORRECT ACCOMMODATION OF § 2 OF THE TWENTY-FIRST AMENDMENT AND THE COMMERCE AND SUPREMACY CLAUSES IS RECOGNITION OF THE PREVALENCE OF THE FEDERAL ANTITRUST LAWS

A. The central purpose of § 2 of the Twenty-first Amendment was to help dry states remain dry

The text of § 2 of the Twenty-first Amendment scarcely supports the reading given it by petitioner. Section 2 prohibits the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof. . . ." The provision by its explicit terms specifically addresses "*transportation or importation*" of liquor "*into* any State . . ." (emphasis added), the key concept that governs every other word in the Section. It requires a tortured reading indeed to convert the language of § 2 into an across-the-board repeal of the federal antitrust laws or into a plenary grant of authority to the states over all aspects of the alcoholic beverage business, whether or not related to unwanted importation. Petitioner espouses such a reading, but the text of the provision will not support it, for reasons immediately evident upon consideration of the background and history of § 2.

As noted above, the practical enforcement problems confronted by dry states in an era when prohibition was in vogue prompted the Wilson Act and, when that failed, the Webb-Kenyon Act. To preserve and solidify what was accomplished in those Acts, a derivation of the text of Webb-Kenyon was incorporated into the Twenty-first Amendment, as § 2. As this Court stated in *Craig v. Boren,* 429 U.S. 190, 205-06 (1976):

> The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment. In the License Cases, the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause. Later in the century, however Leisy v. Hardin undercut the theoretical underpinnings of the License Cases. This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the state's regulatory role through the passage of the Wilson and Webb-Kenyon Acts. . . . With passage of the Eighteenth Amendment, the uneasy tension between the Commerce Clause and state police power temporarily subsided.
>
> The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. (footnotes and citations omitted).

As Mr. Justice Marshall stated in his dissenting opinion in *California v. LaRue,* 409 U.S. 109, 134 (1972), § 2 "by its terms speaks only to state control of the *importation* of alcohol, and its legislative history makes clear that it was intended only to permit 'dry' states to control the flow of liquor across their boundaries despite potential Commerce Clause objections." Mr. Justice Marshall further recounted the history of § 2 in a footnote to the above statement, which reads as follows:

> The text of the Amendment is based on the Webb-Kenyon Act, which antedated prohibition. The Act was entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," and was designed to allow "dry" States to regulate the flow of alcohol across their borders. . . . The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor, "to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
>
> "[T]he pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Sen. Blaine).

Id., n.14 (citations omitted). *See also United States v. Tax Comm'n of Miss.,* 412 U.S. 363, 378 (1973) (Section 2 is "a provision designed only to augment the powers of the States to regulate the importation of liquor destined for use, distribution or consumption in its own territory. . . .").

Other courts that have examined the scope and purpose of § 2 have also concluded that it "represents the incorporation of a somewhat narrowed version of the Webb-Kenyon Act . . . into the Constitution." *Sail'er Inn, Inc. v. Kirby, Director of ABC,* 5 Cal. 3d 1, 11 (1971) (citations

omitted).[21] For example, in ruling that § 2 does not create a general antitrust immunity, the Tenth Circuit stated:

> The general import of [§ 2] is to prohibit importation into a state for delivery or use therein in violation of the laws of that state. Its main purpose, then, would appear to have been to give a dry state power to protect itself from importation of liquor into the state for use therein.

Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425, 429 (1977).[22]

---

[21] As the court in *Sailer Inn* also pointed out:

> The Twenty-first Amendment clearly was not intended to work . . . a wholesale "repeal" of the commerce clause in the area of alcoholic beverage control. When national prohibition was terminated by section 1 of the Twenty-first Amendment, section 2 was added as a "saving clause" to protect the laws of states which chose to retain prohibition against a possible conflict with the commerce clause. . . . The language of the amendment clearly reflects the purpose, since it prohibits the importation or transporting of liquor only into states where such importation will be in violation of the laws thereof.

Ibid. (citations omitted).

[22] The literature on § 2, both recent and in the years soon after enactment of the Amendment, provides a chorus of support for reading the Section, consistent with its terms, as a constitutional embodiment of Wilson and Webb-Kenyon. *E.g.*, Carr, *Liquor and the Constitution*, 7 Law & Contemp. Prob. 709, 710 (1940) (Section 2 "was enacted in an effort to guarantee to the states by the Constitution the same freedom to control liquor that the Webb-Kenyon Act had given them by statute."); Note, *Retail Price Maintenance for Liquor: Does the Twenty-first Amendment Preclude a Free Trade Market?* 5 Hastings Con. L. Q. 507, 513 (1978) ("Section two of the Twenty-first Amendment was added merely to enable the dry states to prohibit, without commerce clause restraints, the importation of liquor."); Comment, *The Concept of State Power Under the Twenty-first Amendment*, 40 Tenn. L. Rev. 465, 471 (1973) (There is "little doubt that section 2 was included to protect the dry states by making the Webb-Kenyon Act a permanent part of the Constitution."); Note, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815, 816-17 (1946) ("The sole function of Section Two was to render an ironclad protection to the 'dry states' against any possible influx of intoxicants from non-prohibition areas. This purpose was to be achieved by transplanting into the Constitution pre-existing legislation: the Webb-Kenyon Act."); Comment, 25 Calif. L. Rev. 718, 725, 728 (1937) (Section 2 "was an enactment into the Constitution of the Webb-Kenyon Act. . . .").

A review of the congressional debates on § 2 makes quite clear that the above authorities correctly construe the Section. The text of the Twenty-first Amendment originated in the Senate as S.J. Res. 211, see 76 Cong. Rec. 4138-39 (1933), and the Senate debates, which occurred on February 15 and 16, 1933, *id.*, 4138-79, 4215-32, are the only "legislative history" of significance with regard to the purpose of § 2. The key passages of the debates occur at *id.*, 4140-43, 4170-71, and involve Senators Blaine and Borah.

The sponsors of § 2, exponents of prohibition, were concerned that the repealer provision, § 1, would throw the dry states back to the shaky protection of the Webb-Kenyon Act. The constitutionality of that Act was narrowly upheld by a divided Court in *Clark Distilling Co. v. Western Maryland Ry. Co., supra.* Earlier, then President, subsequently Chief Justice Taft and his Attorney General had found the Act unconstitutional. (It passed over Taft's veto. 76 Cong. Rec. 4170 (remarks of Senator Borah).) Moreover, the Court had been known to change its mind about state power to ban liquor. *See, e.g., ibid.; Leisy v. Hardin, supra.*

The solution was to build Webb-Kenyon into the Constitution through § 2. That this was undeniably the purpose of § 2 is illustrated by the remarks of Senator Blaine, the senator in charge of S.J. Res. 211, § 2 of which became (without change) § 2 of the Amendment. 76 Cong. Rec. 4142. Senator Blaine reported to the full Senate the views of the Senate Judiciary Committee, the sponsor of S.J. Res. 211, regarding § 2, as follows:

> In the case of Clark against Maryland Railway Co. there was a divided opinion [about the constitutionality of Webb-Kenyon]. There has been a divided opinion in respect to the earlier cases, and that di-

> vision of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line. Mr. President, the pending proposal will give the States that guarantee . . . .

Id., 4141. *See id.*, 4140-42 (Senator Blaine's report on the views of the Senate Judiciary Committee on § 2).

Similarly, Senator Borah, a member of the Judiciary Committee, a participant in the earlier congressional debates on Webb-Kenyon, *see* 49 Cong. Rec. 702 (1912), and a leading opponent of repeal, argued as follows in response to an amendment that would have eliminated § 2 ". . . [T]his is the question of striking out Section 2, which provides for the protection of the so-called dry States . . . It does not seem to me that we can afford to strip the amendment of all effort to protect the dry States." *Id.*, 4170. Borah went on to argue that the Webb-Kenyon Act does not provide "sufficient protection to the dry States" as it "is still of doubtful constitutionality," and the elimination of Section 2 would mean "asking the dry states to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law." *Ibid.*

Senator Walsh, another prohibitionist, likewise supported § 2. He did so on precisely the same grounds (in response to the same Commerce Clause loopholes opened by the Court in *Leisy* and *Rhodes, supra*) that prompted Webb-Kenyon:

> It is true that the original Constitution authorizes Congress to prohibit the transfer of intoxicating liquors in interstate commerce. It is held, however, that that authority simply indicates the intention to have commerce free except as Congress may otherwise direct. It has been held that under the existing Constitution the right obtains on the part of any

> citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee; so that they can not be stopped at the State line nor there fall under the jurisdiction of the State authorities, but the goods will not fall under the jurisdiction of the State authorities until they actually get into the possession of the consignee who may live in the center of the State. Meanwhile all manner of opportunity is afforded for the diversion of the intoxicating liquors from the consignee to whom they are addressed. Likewise, even then, the intoxicating liquor is protected by the commerce clause; if it remains on the siding in the car of the transportation company, it still remains under that protection, and if it goes into a warehouse belonging to the transportation company it remains under the protection of the Federal statute, and is immune from any control by State statutes until it actually reaches the possession of the consignee. The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter. *Id.*, 4219.

In sum, the legislative history of § 2, the provision relied on by petitioner, illustrates a purpose simply to allow prohibition to those states that really wanted it. It does not indicate that the Amendment was designed to do more than that.

S. J. Res. 211 originally contained a § 3, which was voted down before the proposed amendment cleared that chamber. *Id.*, 4179. Section 3, as proposed, provided that: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Id.*, 4141. Thus, despite repeal of the Eighteenth Amendment, was the power of the federal government to be extended beyond the then-believed limits of the Com-

merce Clause to reach what was then considered to be an intrastate perfidity, the saloon. *Id.,* 4141-43. Those who espouse an absolutist view of the Twenty-first Amendment cite the rejection of § 3 by the Senate as support for their position. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 337-38 (1964) (Black, J., dissenting); *Amicus* Brief of Virginia Beer Wholesalers Association 9-12.[23] The position is untenable on the face of the proposed § 3 and the actually adopted § 2.

Section 3, by its terms, was designed to extend the power of Congress to reach a very specific, local matter—"the sale of intoxicating liquors to be drunk on the premises where sold." To extrapolate from the rejection of a proposal to permit Congress to deal with a particular matter of local concern (saloons) to a conclusion that congressional power was intended to be curbed on all fronts would be a remarkable misreading—especially in light of the narrowness of the language of the section that was retained, § 2.

---

[23]The Virginia Beer Wholesalers Association twice quotes a sentence from Senator Blaine, the manager of S.J. Res. 211, which reads: "The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." Beer Br. 10, 12. Appearently this is the best quote *amicus* can find. In neither instance of quotation does the brief quote in full the preceding two sentences:

> Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views.

76 Cong. Rec. 4143. As the preceding pages of the Congressional Record indicate, Senator Blaine was careful to distinguish between the views of the Judiciary Committee, which he represented on the Senate floor, and his personal views, which were rejected by a majority of his committee—a fact that the Virginia Beer Wholesalers Association fails to bring out. The Blaine "absolutist" quote the Association rests its brief on constituted a minority viewpoint in the Congress that considered the Twenty-first Amendment, as it has in this Court.

The text of the debates on the proposed § 3 repeatedly reveals that it was, for all intents and purposes, simply an anti-saloon provision. Saloons were universally condemned by the senatorial orators, and the drafters of S.J. Res. 211 apparently thought it necessary to empower Congress, as well as the states, to curb them to insure their demise. However, a reaction to § 3 occurred during the debates, based on the failure of federal efforts to enforce prohibition under the Eighteenth Amendment. A slim consensus developed that federal enforcement of prohibition should not be continued in any form, even if it were narrowed in focus to the banning of saloons. 76 Cong. Rec. 4145-48; 4170-78.

It must be remembered that the debates on § 3 were against the background of the Eighteenth Amendment, which had extended congressional power beyond the scope of then-prevailing Commerce Clause doctrine. Section 3 would have preserved some small part of the Eighteenth Amendment extension of congressional power, on the subject of saloons. The rejection of § 3 represents nothing more than a decision by the Senate not to attempt to preserve a limited part of the regime set up by the Eighteenth Amendment. All this meant was a refusal to retain for Congress an authority extending beyond the then-accepted limits of Commerce Clause powers.[24]

---

[24]*See* 40 Tenn. L. Rev., *supra,* at 472-73:

> Throughout the Senate debates preceding adoption of the resolution proposing the amendment, there is reference to the idea that the states alone should deal with the liquor problem. Control of liquor regulation by the individual states rather than by the federal government was, of course, the purpose of section 2 of the amendment. But some of the language referring to restoration to the states of "absolute control" over traffic in intoxicating liquors has been construed as giving to the states plenary powers apparently unlimited by constitutional restrictions. Such an interpretation gives this language too broad a meaning. When originally reported out of committee, the amendment contained a section 3, not present in the enacted

Viewed in accurate context, the purpose of the Twenty-first Amendment was not to work a fundamental alteration in congressional power under the Commerce Clause. Because of "substantive" readings of the Commerce Clause by this Court in an earlier era which banned traditional state regulation of liquor even where Congress had taken no action, it was necessary to lift Commerce Clause doctrinal restrictions which inhibited those states that wished to retain prohibition. At the invitation of the Court, Congress did this itself in the Wilson and Webb-Kenyon Acts. Section 2 made this election permanent; it blocked Congress from withdrawing the permission to the states contained in those Acts to regulate liquor despite this Court's definitions of when liquor was in commerce—a permission applicable to those instances in which Congress itself had not acted. The Amendment thus permitted the states to deal with unwanted transportation and importation. But it was not intended to and by its terms did not resolve the question of the appropriate resolution of competing state and federal interests when Congress took action and when that action was not designed to force on the states liquor importation they did not want.

Actions by Congress soon after the enactment of the Twenty-first Amendment further evidence the narrow scope of § 2. In 1935, Congress enacted the Federal Alcohol Ad-

amendment, that provided that Congress should have concurrent power with the states to regulate the sale of liquor to be consumed on the seller's premises. It was feared that this power, if retained by Congress, could be extended to all phases of liquor regulation and was therefore deleted from the proposed amendment. It was in response to the original section 3 and the retention by Congress of power to regulate liquor that references to "absolute control" by the states and similar language were used. Read in the proper context, this language cannot be taken to mean that the twenty-first amendment was intended to grant to the states powers unlimited by other constitutional provisions. (footnotes omitted).

ministration Act. 27 U.S.C. § 201 *et seq.* In so doing, Congress explicitly considered state-federal conflicts and elected to override state law. Congress found that the alcoholic beverage industries were national in scope, posing problems beyond the scope of effective state regulation. H.R. Rep. No. 1542, 74th Cong., 1st Sess. 1-2 (1935). A federal licensing requirement was imposed, reaching even those engaged wholly in intrastate commerce. 27 U.S.C. § 203(c)(1). This Court had no difficulty upholding the Act, dismissing the assertion that the Twenty-first Amendment gives the states "complete and exclusive control over commerce in intoxicating liquors, unlimited by the Commerce Clause" in seven words: "We see no substance in this contention." *William Jameson & Co. v. Morgenthau,* 307 U.S. 171, 172-73 (1939). The intrastate licensing aspect of the Act was also specifically upheld by the Eighth Circuit. *Hanf v. United States,* 235 F.2d 710, *cert. denied,* 352 U.S. 880 (1956).[25]

Because of the mid-1930's rulings of this Court, Congress paid close heed to the constitutionality of its enactments in general in that era and in particular in formulating the FAA Act in 1935. In introducing the bill that became the Act, its sponsor Representative Cullen assured the House:

[25]After concluding that Congress intended to erect an intrastate licensing requirement, the Eighth Circuit held:

> The next question is whether the Act as so interpreted is constitutional. It is conceded that the 21st Amendment did not deprive the federal government of control over the liquor traffic in interstate commerce. . . . The 21st Amendment by its terms prohibits transportation of liquors into a state in violation of the laws of such state. The ability on the part of the states to restrict liquor traffic in no way deprives the federal government of concurrent jurisdiction. Beyond a doubt the states have been given broad surveillance over liquor business within their boundaries, but it is equally certain that their jurisdiction is not plenary and exclusive.

Id., 717-18 (citations omitted).

> *No provision of the bill is violative of the Constitution* either because it denies a fundamental right secured by the Constitution *or because it invades a field of regulation reserved by the Constitution to the States.*

79 Cong. Rec. 12178 (emphasis added).

The views of the Seventy-fourth Congress are entitled to substantial weight in interpreting the Twenty-first Amendment. That Congress sat soon after enactment of the Amendment, and it made clear its understanding that the Amendment did not unwind the Supremacy Clause in the alcoholic beverage field. Its actions confirm the substance of the debates on the Amendment: the states' power to regulate alcoholic beverages was freed of the total barrier erected by past Commerce Clause doctrine, but the Amendment did not eliminate congressional power under the Commerce Clause, nor did it subordinate congressional power to the states.

B. This Court's Decisions Confirm That § 2 Does Not Eviscerate The Commerce Clause Powers of Congress Over Matters of Substantial National Concern

This Court's first four decisions under § 2 were authored by Mr. Justice Brandeis. *State Bd. of Equalization v. Young's Market,* 299 U.S. 59 (1936); *Mahoney v. Joseph Triner Corp.,* 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n,* 305 U.S. 391 (1939); *Finch v. McKittrick,* 305 U.S. 395 (1939). All of the cases upheld state statutes directed at importation, which was not surprising, since unwanted importation was the core concern of § 2. Yet the approach taken in the Brandeis opinions, particularly the refusal to examine the history of § 2, *Young's Market,* 299 U.S. at 63-64; *Mahoney,* 304 U.S. at 404, suggested that the Amendment was to be read as eliminating Congress' powers over liquor under the Commerce Clause, and conceding the area exclusively to the states. *Indianapolis Brewing,* 305 U.S. at 394; *Finch,*

305 U.S. at 398.[26] However, subsequent rulings by this Court have read § 2 in a manner far more obedient to its text and history.

In the context of an antitrust challenge to the distilled spirits statute adopted by New York after it dropped RPM, this Court declared in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 42 (1966), that the "second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor."

In *Idlewild, supra,* 377 U.S. at 330-32 (1964), the Court eliminated the possibility that the early Brandeis opinions had converted the Twenty-first Amendment into a repeal of the Commerce Clause:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.
>
> . . . . .

---

[26] In addition to the Brandeis decisions, several individual Justices have read § 2 as an absolute grant of power to the states, overriding national interests. The strongest statement of this position appears in Mr. Justice Black's dissenting opinion, joined by Mr. Justice Goldberg, in *Idlewild, supra,* 377 U.S. at 334-40 (legislative history of Amendment shows return of "absolute control" over liquor to states, freed of all Commerce Clause restrictions). *See also Dept. of Rev. v. James B. Beam Distilling Co.,* 377 U.S. 341, 347-48 (1964) (Black, J., dissenting, joined by Goldberg, J.); *United States v. Frankfort Distilleries,* 324 U.S. 293, 300-02 (1945) (Frankfurter, J., concurring). The "absolutist" views appearing in these opinions by individual Justices have not been adopted by any Court majority.

The absolutist views expressed by Justice Black in his mid-1960's dissenting opinions represent a rigidification of less doctrinaire positions he espoused earlier as a Justice and as a Senator joining in the debates on promulgation of the Twenty-first Amendment. *See Carter v. Virginia,* 321 U.S. 131, 138 (1944) (Black, J., concurring) (open question as to the "precise amount of power" the Twenty-first Amendment left in Congress to regulate liquor under the Commerce Clause); 76 Cong. Rec. 4177-78 (1933) (Remarks of Senator Black).

> To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed" then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.
>
> . . . . .
>
> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

To be sure, the Twenty-first Amendment has curtailed congressional power under the Commerce Clause to some extent. Section 2, as noted above, prevents Congress from, in essence, repealing the concept of the Webb-Kenyon Act and thus destroying the power of the states to block importation because of the interstate character of liquor shipments. The Amendment "primarily created an exception to the normal operation of the Commerce Clause." *Craig v. Boren, supra,* 429 U.S. at 206.

> Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."

Ibid. (quoting *Idlewild, supra*). *See also California v. LaRue,* 409 U.S. 100, 114-15 (1972) (Twenty-first Amendment conveys extra powers to states but does not wholly supersede other provisions of the Constitution).

The modern Twenty-first Amendment rulings of this Court properly read the Brandeis opinions as "centered

upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear. . . ." *Craig v. Boren, supra,* 429 U.S. at 207. *See California v. Washington,* 358 U.S. 64 (1958) (*per curiam*). Apart from state efforts to ban importation, state power plainly is not absolute, especially when the state seeks to block the actual exercise of Commerce Clause power by Congress. The Court made this point as early as 1946:

> Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the states the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the state's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic. . . .

Nippert v. City of Richmond, 327 U.S. 416, 425 n.15 (1946) (citation omitted).

C. This Court Has Never Held The Federal Antitrust Laws To Be Preempted By State Liquor Regulation

There is no dispute that the Twenty-first Amendment creates "an important distinction between state power over the liquor traffic and state power over commerce in general." *Duckworth v. Arkansas,* 314 U.S. 390, 398 (1941). But this Court has never held that state power over alcoholic beverages includes the power to eviscerate the antitrust laws. Rather, it has recognized the application of the Sherman Act to intrastate sales of alcoholic beverages, *e.g., Burke v. Ford,* 389 U.S. 320 (1967) (*per curiam*), and rejected claims that the Twenty-first Amendment wholly preempts the operation of the Sherman Act. *United States v. Frankfort Distilleries,* 324 U.S. 293 (1945) (opinion of

the Court by Black, J.).[27] On one occasion, the Court rejected an antitrust attack on a state liquor statute (which required an "affirmation" that prices charged in the state did not exceed those elsewhere). However, this decision rested on a conclusion that the state statute on its face did not appear to require activity that would violate the antitrust laws and there was, accordingly, no conflict between state and federal law. *Seagram, supra,* 384 U.S. at 45-46. The Court in *Seagram* plainly did not conclude that the Sherman Act was obviated by the Twenty-first Amendment. To the contrary, because it reviewed the antitrust questions presented, *Seagram* is a holding that the antitrust laws apply in general to alcoholic beverages, despite the presence of potentially conflicting state law.

As shown by *Seagram,* this Court, out of deference to federalism concerns, has made clear that it will proceed with extreme caution before concluding that state law clashes with the requirements of federal law. It has never found a conflict between state alcoholic beverage law and the antitrust laws. Petitioner's brief would make it appear that the previous decisions of this Court have resolved the question of a square conflict between such state laws and congressional will expressed in the antitrust laws or other legislation deriving from the Commerce Clause. In fact, the Court has specifically reserved judgment on this question on a number of occasions.

In *Frankfort Distilleries,* the Court found no conflict and enforced the federal antitrust laws. At the close of its opinion, the Court stated that it was not presented with:

[27]Lower federal courts have also rejected the contention that the Twenty-first Amendment repeals the antitrust laws for alcoholic beverages. *See, e.g., Lamp Liquors, Inc. v. Adolph Coors Co.,* 563 F.2d 425, 429 (10th Cir. 1977) (Section 2 does not "seek to authorize the granting of antitrust exemption or immunity."); *United States v. Erie County Malt Beverage Distrib. Ass'n,* 264 F.2d 731 (3d Cir. 1959).

> . . . a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented.

Id., 324 U.S. at 299. *See also Seagram, supra.*

No decision from this Court since *Frankfort Distilleries* has specifically resolved the question left open by Mr. Justice Black, in his opinion for the Court.[28] The question remains open in this Court.

D. The Correct Accommodation Of Competing State And Federal Interests Is Recognition of The Prevalence Of the Federal Antitrust Laws

In "the context of the issues and interests at stake" in this case, the correct "accommodation of the Twenty-first Amendment with the Commerce Clause . . .," *Idlewild, supra,* 377 U.S. at 332-33, is recognition of the prevalence of the federal antitrust laws.

The state courts and the ABC Appeals Board have concluded, in determinations not open to inquiry before this Court, that alcoholic beverage RPM does not advance the state's goal of temperance and orderly marketing conditions. *E.g., In re Corsetti,* Memo. App. A at 16, 17, 19-23; *Rice v. ABC Appeals Board,* Pet. App. C at 36-38. As noted at the outset of this brief, the pertinent state governmental entities plainly do not view RPM as vital to the state's alcoholic beverage regulatory policy, or even as desirable, and do not seek reversal of the judgment below or reinstatement of RPM. Petitioner, a trade association

[28]*See Heublein, Inc. v. So. Car. Tax Comm'n,* 409 U.S. 275, 282 n.9 (1972):

> And, though the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause. Cf. *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951).

comprised of a group of California retailers, constitutes the only real exponent of fair trade.

It is, at this late date, probably impossible to reinstate RPM for all types of alcoholic beverages in the state, because of numerous events and governmental decisions in the last several years. A reversal by this Court would, at best, create extensive confusion. Moreover, if the state truly does desire to promote temperance and to assist the survival of less efficient retailers, there are abundant (and far more effective) alternatives available that do not require the discarding of antitrust values. One alternative, allowing group purchases by retailers in order to qualify for volume discounts, has already been adopted by the state legislature following the demise of distilled spirits RPM. 1979 Cal. Stats. ch. 455.

By contrast, the RPM provisions at stake constitute a frontal assault on the Sherman Act and a harsh blow to the weighty federal interest in uniform application of the antitrust laws. The Sherman Act is central to a fundamentally important body of federal law. In 1975, Congress again rejected price fixing as a method of doing business in this country by repealing the federal exemption for fair trade. The state provisions under scrutiny directly undercut the congressional will, as expressed in an explicit exercise of power under the Commerce Clause.

Respondent does not contend that all exercises of national power must override contrary state alcoholic beverage laws. There may be certain state approaches that will override even the Sherman Act—those that are responsive to the local concerns that inspired § 2 of the Twenty-first Amendment. But such approaches are not presented in this case. The state provisions at issue here are remote from the underpinnings of the Twenty-first Amendment (which, as demonstrated, is principally addressed to a different set of problems wrapped up in state efforts at prohibition). The federal provision, by contrast, is at the core of the Commerce Clause and the important national interest in preserving free and open markets.

The strongest point in favor of recognizing the prevalence of federal law in this case is that, as demonstrated above, the Twenty-first Amendment, as shown by its text and history, plainly was not intended to lead to the result sought by petitioner. It would require a substantial distortion of that Amendment to prompt reversal in the circumstances of this case. Also of considerable significance are the consequences for federal law that would flow from adoption of petitioner's position. Federal antitrust law resembles in national interest the tax, labor and securities laws. A ruling for petitioner would lead to the astounding result of casting severe doubt on the supremacy of those bodies of national law, as applied to the alcoholic beverage industries. In logic, it would, for example, threaten the application of federal minimum wage laws (which also derive directly from the Commerce Clause) to these industries—a result that simply cannot be fit within any rational scheme for delineating the contours of the Twenty-first Amendment.

In *Jatros v. Bowles,* 143 F.2d 453 (1944), the Sixth Circuit dealt with a contention that the Twenty-first Amendment rendered it impossible for the federal government to set maximum limits on the price of alcoholic beverages for sale by the drink. The court rejected the contention, ruling that the Twenty-first Amendment does not "deprive the national government of all authority to legislate in respect of interstate commerce in intoxicants." *Id.,* 455. The court then stated:

> Followed to its logical conclusion, the appellant's construction, if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages . . ., *nor to regulate or prohibit unfair trade practices in respect to such commodities through the*

> *Federal Trade Commission,* nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under the authority of the National Labor Relations Act, nor to prescribe minimum wages or maximum hours for employees in such enterprises under the authority of the Fair Labor Standards Act. These implications demonstrate the tenuousness of the appellant's broad contentions.

Ibid. (emphasis added) (citations omitted). *Accord, Taub v. Bowles,* 149 F.2d 817, 822 (Emer. Ct. App.), *cert. denied,* 326 U.S. 732 (1945). The tenuousness of petitioner's broad contentions is equally evident in this case, if attention is paid to the consequences of their adoption by this Court.

There is no powerful argument in support of reversal in this case that derives from the Twenty-first Amendment, properly understood. There are compelling reasons for upholding the full force and effect of the federal antitrust laws. In these circumstances, the correct accommodation is recognition of the prevalence of federal law.[29]

---

[29]Petitioner cites *Castlewood Int'l Corp. v. Simon,* 596 F.2d 638 (1979), in which a panel of the Fifth Circuit recently invalidated a federal alcoholic beverage regulation on grounds of conflict with state law and the Twenty-first Amendment. The outcome in *Castlewood* seems dubious, for many of the reasons set forth in this brief, and the case (one would assume) may be on its way to this Court. Whatever the final outcome in *Castlewood,* it is to be noted that the panel's opinion recognizes that there will be instances in which "strong federal interests" must prevail over conflicting state law, despite the Twenty-first Amendment. *Id.,* 643. The Sherman Act expresses precisely such "strong federal interests" which override the state RPM provisions in dispute.

IV

THE STATE ACTION DOCTRINE DOES NOT SAVE THE RPM PROVISIONS FROM INVALIDATION UNDER THE SHERMAN ACT

A. Congress Plainly Intended The Sherman Act To Ban The RPM Activity At Issue, And Thus The State Action Doctrine Does Not Apply

This Court enunciated a "state action" exemption to the Sherman Act in *Parker v. Brown,* 317 U.S. 341 (1943). The *Parker* doctrine assumes that, in the absence of a clear congressional directive, it was not the purpose of Congress in enacting the Sherman Act to override state regulatory programs in certain circumstances. *See id.,* 350-51. The doctrine does not apply to this case, for Congress has repeatedly made clear that the Sherman Act applies with full force to RPM systems such as the one in dispute.

In *Parker,* the Court confronted a conflict between anticompetitive state laws and the expanding scope of congressional power under the Commerce Clause, and thus the expanding reach of the Sherman Act. *See, e.g., Hospital Building Co. v. Rex Hospital Trustees,* 425 U.S. 738, 743 n.2 (1976). Because the Sherman Act reaches all activities that affect commerce, and because the concept of effect on commerce has broadened over the years, state activities once deemed wholly intrastate came into collision with the pro-competitive policies of the Act. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 420-21 (1978) (Burger, C. J., concurring). Relying on federalism concepts, the Court in *Parker* concluded that Congress did not intend the Sherman Act to restrain the California regulatory program at issue in that case. 317 U.S. at 350-52. Simultaneously, the Court assumed that Congress could exercise its Commerce Clause powers to strike down the program under scrutiny. *Id.,* 350.

In most areas of Sherman Act coverage, the 1890 "intent" discussed by the Court in *Parker* remains the final expres-

sion of congressional purpose. As to resale price maintenance, however, Congress on several occasions has made quite clear that state RPM laws are precluded by the Sherman Act unless within the scope of an express congressional exemption. For example, the enactment of the Miller-Tydings Act in 1937, 50 Stat. 693, demonstrates Congress' recognition that state fair trade statutes cannot survive the Sherman Act absent specific congressional authorization. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 607 (1976) (Blackmun, J., concurring); *id.*, 638-39 (Stewart, J., dissenting). At the present time, and at all times during this litigation and the events leading up to it, *no* congressional exemption from the Sherman Act for the RPM provisions at issue was in effect.

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), the Court addressed a claim that a "non-signer" provision in a state fair trade statute was exempt from the Sherman Act's prohibition of vertical price fixing by virtue of the Miller-Tydings Act. Under certain conditions, Miller-Tydings exempted contracts authorized by state law. The terms of the Act did not, however, permit states to require non-signing retailers to adhere to the terms of fair trade contracts signed by other retailers.

Accordingly, the Court concluded that Congress had not intended to exempt the state statute at issue and thus the statute was invalid. In other words, Congress had determined that RPM authorized or compelled by state law could survive only if exempted by express congressional mandate, and no such mandate was applicable.[30] *Cf. Norman's on the*

[30]Petitioner suggests that *Schwegmann* involved a statute under which the state merely authorized rather than compelled conduct inconsistent with the Sherman Act. Pet. Br. 46. This is incorrect. In *Schwegmann*, the Court pointed out that the non-signer provision involved compulsion. 341 U.S. at 389. *See Cantor, supra*, 428 U.S. at 593 n.30; *id.*, 609 (Blackmun, J., concurring); *id.*, 639 (Stewart, J., dissenting). *See also* 1 P. Areeda & D. Turner, Antitrust Law

Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1016 (3d Cir. 1971) (invalidating Virgin Islands statute *requiring* resale price maintenance as not authorized by Miller-Tydings and McGuire Acts). Accordingly, *Parker v. Brown* did not apply.

In the aftermath of *Schwegmann*, Congress again addressed the need to exempt state RPM statutes from federal law if such statutes were to be valid. The congressional response was the McGuire Act, 66 Stat. 632 (1952), which authorized certain state non-signer statutes.

In the twenty years following passage of the McGuire Act, § 1 of the Sherman Act was thus narrowed by specific congressional exemptions authorizing the states to impose certain types of restraints recognized by Congress to be otherwise invalid. In 1975, however, Congress repealed the federal fair trade exemptions from the antitrust laws. The post-1890 balance between state and federal law has thus been restored by Congress, and, entirely apart from state action questions involved in other contexts, Congress has reaffirmed that state RPM laws are invalidated by the Sherman Act. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975). Accordingly, congressional intent is plain, and the *Parker v. Brown* doctrine is inapplicable.

B. Even if the Parker Doctrine Applies to this Case, the RPM Provisions Do Not Meet the Doctrine's Requirements

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court undertook its first significant examination of the scope of the state action doctrine since *Parker*. *Goldfarb* established that the "threshold inquiry" for the *Parker* exemption is whether the activity in question "is required

¶ 209 at 61, ¶ 215 at 94 (1978). Thus, whatever relevance state compulsion versus authorization otherwise may have in the *Parker* context, the fact of compulsion does not exempt state RPM laws from the Sherman Act.

by the State acting as sovereign." 421 U.S. at 790. Application of the threshold test was sufficient to resolve the *Goldfarb* dispute, as the price fixing involved in that case had not been compelled by the state. *Ibid.*

In subsequent cases the Court has amplified the *Parker* doctrine and established that state "compulsion" alone will not lead to antitrust immunity. Other elements are necessary in order to obviate the effect of the Sherman Act. Not all of those elements are present here.

1. THE PARKER DOCTRINE IS NOT SATISFIED BECAUSE OF THE STATE'S FAILURE TO SUPERVISE THE PRICES SET BY PRIVATE PARTIES

In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), the Court faced a Sherman Act challenge to a rule of the Arizona Supreme Court forbidding attorney advertising. The Court held the rule invalid on free speech grounds, but held it immune from the antitrust laws under *Parker.*

On the Sherman Act question, the Court emphasized that the state rule represented the clear command of the state supreme court, the state body empowered to exercise the state's power over the practice of law. The Court also pointed out that its concern that federal policy may be unnecessarily subordinated to state interests was reduced, because the challenged restraint was "subject to pointed re-examination" and actively supervised by the state. *Id.,* 359-62. *Cf.* P. Areeda & D. Turner, *supra,* ¶¶ 211, 213, 214; *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 237 (1976).

The Court's opinion in *Bates* thus recognizes a number of requirements beyond mere state compulsion which must be met under the *Parker* doctrine. Of particular importance here is the requirement that the state undertake active supervision of the anticompetitive activity, for "compulsion alone—in the absence of genuine supervision—does

not prevent preemption." P. Areeda & D. Turner, *supra,* ¶ 209 at 61. *See, e.g.,* Handler, *Twenty-Fourth Annual Antitrust Review,* 72 Colum. L. Rev. 1, 9 (1972). Under the California wine RPM provisions, there is no supervision whatsoever of the prices set by private parties. Indeed, as the highest state court recognized in *Corsetti* as a matter of state law, the ABC has no power to approve, modify, set, or re-examine prices. *Rice v. ABC Appeals Board, supra,* Pet. App. C at 10. The state takes no steps to determine whether the prices that are fixed advance the purported goals of the statutes or, perhaps more importantly, whether federal policies are unnecessarily thwarted. The system provides no mechanism at all by which the state itself determines whether the privately set prices are in the public interest. It simply attempts to negate the Sherman Act.

Parker itself was a case of extensive state supervision; detailed procedures were provided to insure that particular programs would be in the public interest. *See Cantor, supra,* 428 U.S. at 613 n.5 (Blackmun, J., concurring). Under the statutes in issue in *Parker,* the California Director of Agriculture was allowed to grant a request for the establishment of a prorate program only after holding a public hearing and making findings that institution of a prorate program in a given area would "prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers." *Parker, supra,* 317 U.S. at 346. After approval of the proposal, the Director established a program committee to formulate a proration program for the marketing area in question. Individual program proposals were submitted to the Agricultural Prorate Advisory Commission, composed of the Director of Agriculture and eight others appointed by the governor and confirmed by the state Senate. The Commission could then approve the program, after holding a public hearing and making a finding that

"the program is reasonably calculated to carry out the objectives of [the] act." *Id.*, 317 U.S. at 346-47. The prorate program thus required specific economic findings at each critical stage, and it involved direct approval by a state body of the precise restraint to be imposed. The price maintenance program involved in this case is the exact opposite.

The RPM provisions at issue purportedly rest on generalized economic hypotheses which were found by the ABC Appeals Board in *Corsetti* to be invalid. Memo. App. A at 14-23. There is no particularized focus on the need for price restraints in a given area or at a given time to serve those hypotheses, and the state undertakes no evaluation of the particular restraints imposed. Thus, rather than the extensive degree of state involvement present in *Parker,* the RPM provisions involve nothing more than a *carte blanche* authorization for unsupervised price fixing, with the ABC disabled from giving any heed to whether the resultant prices actually advance the purported state goals.

The fact that *price* restraints are involved demonstrates in particular why the absolute absence of state supervision is fatal to the RPM provisions. Preservation of price competition is the fundamental goal of the Sherman Act. In this area, more than all others, there is thus a need for some type of substitute when ordinary principles are rejected. Under the statutes involved in this case, however, the state not only removes the normal play of competitive forces, but installs nothing which will take the place of competition in insuring that the public interest is attained. No responsible concept of federalism suggests in any way that the state should be allowed to trample on fundamental federal interests without providing some state mechanism as a substitute for competition in protecting the public interest. *See, e.g.,* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws,* 49 N.Y.U. L. Rev. 693, 714-15 (1974).

The Court has recognized the critical distinction between state regulation of prices and state authorization to private parties to set prices. *Schwegmann Bros. v. Calvert Distillers Corp., supra,* is one example of a case in which this Court refused to countenance unregulated private price fixing, even though the pricing conduct in question was required by state law. In *United States v. South-eastern Underwriters Ass'n,* 322 U.S. 533 (1944), the Court also recognized the distinction between state regulation of price and state authorization of private price fixing. In *Southeastern Underwriters,* the Court held the business of insurance to be "commerce" within the meaning of the Sherman Act. In response to the contention that this result would invalidate innumerable state insurance laws, the Court distinguished state authorization of unrestrained private price fixing from situations such as that in *Parker* where the state actively participated in establishing price levels, suggesting that only the former would be invalid. *Id.,* 562. *See also Norman's on the Waterfront, Inc. v. Wheatley,* 444 F.2d 1011, 1018 (3d Cir. 1971) (*Parker* exemption for Virgin Islands liquor price maintenance scheme denied partly on the ground that the governmental agency in question had no authority over price levels). Because it fails to provide a surrogate guardian for the public interest in place of unfettered price competition, the wine RPM system at issue does not qualify for exemption under the *Parker* doctrine.[31]

[31]The supervision requirement of the *Parker* doctrine distinguishes *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 439 U.S. 96 (1978) from the present case. *New Motor Vehicle Bd.* involved the California Automobile Franchise Act. The Act allowed for temporary delays in the establishment of new automobile dealerships, at the behest of private parties, but the state agency did not, as does the ABC in this case, serve merely as a rubber stamp for private conduct. As the Court noted in *New Motor Vehicle Bd.,* of 117 protests filed by allegedly aggrieved auto dealers, "only one ever

2. THE RPM PROVISIONS ARE NOT NECESSARY TO THE SUCCESS OF THE STATE'S REGULATORY SYSTEM AND THEREFORE DO NOT QUALIFY FOR A PARKER EXEMPTION

In *Cantor, supra,* a majority of the Court applied the test used to determine whether federal regulation leads to implied antitrust immunity to the state action question. 428 U.S. at 592-98. Under this approach, implied immunity will be found only when the restraint in question is so central to the regulatory system involved that exemption is necessary to make the system work. *See, e.g., id.,* 598. Under this test, the wine RPM provisions must fall.

The AG acknowledges *Cantor's* adoption of implied immunity standards, and blithely asserts that they are met. AG Br. 17. Not surprisingly, the AG does not explain how the RPM provisions are central to the success of regulation of alcoholic beverages in the state. Such an attempt would be doomed to failure.

There is no presently operative RPM system for distilled spirits in California, and the state has dropped enforcement of wine RPM, at least at the retail level. Yet neither the AG nor petitioner can point to any havoc in the California alcoholic beverage industry nor to any indication that the state has lost control over its licensees as a result of the demise of RPM. The ABC Director's public statements, see n.14, *supra,* and his decision not to seek reversal in this case belie any notion that the constitutionally-empowered state agency regards RPM as necessary to its ability to regulate licensees. Obviously, resale price maintenance, especially in the baldly unsupervised and anticompetitive form presented here, is not "necessary" to the state's regulation of alcoholic beverages.

---

matured into a permanent injunction" against the establishment of a new dealership. *Id.,* 110 n.14. Thus, unlike the present case, the state agency actively evaluated the effect of the private conduct in question.

3. THE HARMS RESULTING FROM CALIFORNIA'S RPM SCHEME OUTWEIGH THE BENEFITS, AND A PARKER EXEMPTION IS THEREFORE INAPPROPRIATE

In his *Cantor* concurrence, Mr. Justice Blackmun advocated a "rule of reason" test for determining whether "state-sanctioned anticompetitive activity" should be entitled to an exemption under *Parker. Cantor, supra,* 428 U.S. at 610-12. Under such an approach, the resale price maintenance scheme at issue is invalid.

This case does not present state regulatory conduct which is minimally or peripherally in conflict with federal antitrust laws. *Cf. New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 439 U.S. 96 (1978); *Exxon v. Governor of Maryland,* 437 U.S. 117 (1978). The system squarely conflicts with the Sherman Act. Yet the interference with fundamental federal policy produced by the system cannot be justified by reference to any state benefits allegedly obtained. As the ABC Appeals Board found in *Corsetti,* Memo App. A, the RPM system does not produce the benefits it is supposedly intended to achieve.

No doubt the goal of promoting temperance represents a significant state interest. But, as the Appeals Board found, RPM is a failure at promoting temperance. Moreover, the RPM system does not even require that prices be set at a temperance promoting level (assuming that price has any relationship to temperance). Under the system, prices may be set as high or as low as desired by producers. Thus, it is difficult to discern the state benefit that is to be measured against the federal interest. In any event, there are other methods, far less destructive of federal interests, available to the state to promote the goal of temperance and achieve the other purported aim of the system, order in the distribution of alcoholic beverages.

In the area of economic regulation, the state is free to, as it has, prohibit predatory practices which may contrib-

ute to disorder in the marketing of alcoholic beverages. State laws prohibiting the use of loss leaders, Cal. Bus. & Prof. Code § 17044, below-cost pricing, Cal. Bus. & Prof. Code § 17043, locality discrimination, Cal. Bus. & Prof. Code § 17040, and similar provisions, preserve order in the marketing of alcoholic beverages in a manner consistent with the federal antitrust laws. California has these and other ample methods available to promote order without abandoning federal interests to the whim of private interests. However, the state has not limited its efforts to promote order to regulation consistent with federal law; it has instead adopted the RPM scheme in issue which directly conflicts with the fundamental federal interests expressed in the Sherman Act. The assault on the competitive dictates of the antitrust laws cannot be justified as the RPM system has failed to obtain countervailing state benefits which might support displacement of the predominant federal policies. Accordingly, the RPM system is not entitled to a *Parker* exemption.

CONCLUSION

In the Sherman Act, "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette, supra,* 435 U.S. at 398. As this Court stated in *United States v. Topco Assoc.,* 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

The judgment below fully accords with the fundamental federal interests at stake and reaches the correct accommodation of the state and federal concerns represented by the constitutional provisions at stake. For these and the other reasons set forth in this brief, the judgment below should be affirmed.

Respectfully submitted,

ELLIOT S. KAPLAN
ROBINS, DAVIS & LYONS

FRANK C. DAMRELL, JR.
DAMRELL, DAMRELL & NELSON
Of Counsel

JACK B. OWENS
ROBERT E. FREITAS
ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE
Attorneys for Respondent Midcal Aluminum, Inc.